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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

HARRIS KENNEDY, ET AL. ..... *Petitioners,*

v. No. 590

SILAS MASON COMPANY ..... *Respondent.*

ON WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE*

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SUBJECT INDEX

TABLE OF CASES CITED

STATUTES CITED

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OPINIONS BELOW

Opinions of the District Judge appear in 70 F. Supp. 929, and 68 F. Supp. 576. Opinion of the Circuit Court of Appeals appears in 164 F. (2) 1016.

JURISDICTION

Certiorari to the Circuit Court of Appeals for the Fifth Circuit was granted March 8, 1948, ___ U. S. ___, ___ L. Ed. ___.

PRELIMINARY STATEMENT

The Arkansas Ordnance Plant at Jacksonville, Arkansas, was an ordnance facility built and operated during the war for the purpose of producing artillery fuses, boosters, primers, detonators, and other war munitions. Its construction and operations were effected by the Government through the agency of Ford, Bacon & Davis, Inc., a cost-plus-a-fixed-fee contractor, pursuant to authorization con-

tained in the following laws: The Act of July 2, 1940 (Public No. 703, 76th Congress); the Act of March 11, 1941 (Public No. 11, 77th Congress), and the Act of June 30, 1941 (Public No. 139, 77th Congress).

The attorneys whose names appear on this brief are defending the claims of several thousand former employees at the Arkansas Ordnance Plant who seek additional compensation under the provisions of the Fair Labor Standards Act. Because this case presents important questions of law that may be conclusive in the cases mentioned above, the undersigned, with consent of counsel for the parties, and with leave of court, submit this brief *amici curiae*.

SUMMARY OF THE ARGUMENT

I

EMPLOYEES AT ORDNANCE FACILITIES ARE EMPLOYEES OF THE UNITED STATES

Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. A. 201-219.

United States v. *Driscoll*, 96 U. S. 421, 24 L. Ed. 847 (1878).

Alabama v. *King & Boozer*, 314 U. S. 1, 86 L. Ed. 3 (1941).

James v. *Dravo Contracting Co.*, 302 U. S. 134, 82 L. Ed. 155 (1937).

John L. Lewis v. *United States*, ... U. S. ....., 91 L. Ed. 595 (1947).

National Labor Relations Board v. *Atkins & Company*, 331 U. S. 398, ..., 91 L. Ed. 1157, 1165 (1947).

Act of July 2, 1940, c. 508, 54 Stat. 712, 50 U. S. C. A. App. § 1171.

Hirabayshi v. *United States*, 320 U. S. 81, 93, 87 L. Ed. 1774, 1782 (1943).

Arver v. *United States*, 245 U. S. 366, 62 L. Ed. 349 (1917).

United States v. *Bethlehem Steel Corporation*, 315 U. S. 289, 305, 86 L. Ed. 855, 866 (1942).

Stewart v. *Kaiser Co., Inc.*, 71 F. Supp. 551 (D. C., Oreg., 1947).

Bowles v. *Willingham*, 321 U. S. 503, 519, 88 L. Ed. 892, 905 (1944).

Singer Mfg. Co. v. *Rahn*, 132 U. S. 518, 33 L. Ed. 440 (1889).

Rutherford Food Corporation v. *McComb*, 331 U. S. 722, 91 L. Ed. 1350 (1947).

McComb v. *McKay*, ... F. (2) ....., C. C. H. 13 Labor Cases ¶ 64,113 (C. C. A. 8, 1947).

Inland Waterways Corporation v. *Young*, 309 U. S. 517, 523, 84 L. Ed. 901, 906 (1940).

Cherry Cotton Mills v. *United States*, 327 U. S. 536, 539, 90 L. Ed. 835, 838 (1946).

Keifer v. *Reconstruction Finance Corporation*, 306 U. S. 381, 390, 83 L. Ed. 784, 789 (1939).

II

EMPLOYEES AT GOVERNMENT-OWNED ORDNANCE FACILITIES ARE NOT ENGAGED IN PRODUCTION OF MUNITIONS FOR COMMERCE.

Barksdale v. *Ford, Bacon & Davis, Inc.*, 70 F. Supp. 690 (E. D., Ark., 1947).

H. B. Deal & Co., Inc., v. *Leonard*, 210 Ark. 512, 196 S. W. (2) 991 (1947).

National Labor Relations Board v. *Sunshine Mining Co.*, 110 F. (2) 780 (C. C. A. 9, 1940).

Fox et al., v. *Summit King Mines, Limited*, 143 F. (2) 926 (C. C. A. 9, 1944).

Walling v. *Haile Gold Mines, Inc.*, 136 F. (2) 102 (C. C. A. 4, 1943).

Holland v. *Haile Gold Mines, Inc.*, 44 F. Supp. 641 (1942).

Ritch v. *Puget Sound Bridge & Dredging Co., et al.*, 156 F. (2) 334, (C. C. A. 9, 1946).

Ritch v. *Puget Sound Bridge & Dredging Co.*, 60 F. Supp. 670 (W. D., Wash., 1945).

Clyde v. *Broderick et al.*, 144 F. (2) 348 (C. C. A. 10, 1944).

Clyde v. *Broderick*, 52 F. Supp. 533 (D. C., D. Col., 1943).

Crabb v. *Welden Brothers*, 164 F. (2) 797 (C. C. A. 8, 1947).

Divins v. *Hazeltine Electronics Corp.*, 163 F. (2) 100 (C. C. A. 2, 1947).

New York ex rel. Rogers v. *Graves*, 299 U. S. 401, 406, 81 L. Ed. 306, 309 (1937).

Ashwander v. *Tennessee Valley Authority*, 297 U. S. 288, 80 L. Ed. 688 (1936).

Carter v. *Carter Coal Co.*, 239 U. S. 238, 239, 80 L. Ed. 1160, 1182 (1936).

United States v. *Darby*, 312 U. S. 100, 85 L. Ed. 609 (1941).

Young v. *Kellex Corporation*, ... F. Supp. ....., C. C. H. 14 Labor Cases ¶ 64,244 (E. D., Tenn., 1948).

III

MUNITIONS PRODUCED AT GOVERNMENT-OWNED ORDNANCE FACILITIES ARE NOT GOODS AS DEFINED IN THE FAIR LABOR STANDARDS ACT.

Barksdale v. *Ford, Bacon & Davis, Inc.*, 70 F. Supp. 690, 693 (E. D., Ark., 1947).

Anderson v. *Federal Cartridge Corporation*, 72 F. Supp. 644 (D. Minn., 1947).

Kruger v. *Los Angeles Shipbuilding and Drydock Corporation*, ... F. Supp. ....., C. C. H. 12 Labor Cases ¶ 63,660 (S. D., Calif., 1947).

Lynch v. *Embry-Riddle Co.*, ... F. Supp. ....., C. C. H. 10 Labor Cases ¶ 62,923 (S. D., Fla., 1945).

Divins v. *Hazeltine Electronics Corporation*, 163 F. (2) 100 (C. C. A. 2, 1947).

Crabb v. *Welden Brothers*, 164 F. (2) 797 (C. C. A. 8, 1947).

Bell v. *Porter*, 159 F. (2) 117 (C. C. A. 7, 1946).

Wilcox v. *Jackson*, 13 Pet. 498, 10 L. Ed. 264 (1839).

United States v. *Clarke*, 20 Wall. 92, 22 L. Ed. 320, 323 (1874).

ARGUMENT

I.

EMPLOYEES AT ORDNANCE FACILITIES ARE EMPLOYEES OF THE UNITED STATES.

The Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. A. 201-219, was never intended to apply to the Government of the United States or to its employees. If this is not clear from the declaration of policy set forth in Section 2 of the Act, all doubt is removed by the express provision of Section 3(d), to the effect that the term "employer" shall not include the United States.

A primary question, therefore, is whether the petitioners, for purposes of the Fair Labor Standards Act, are employees of the United States. The lower courts, generally speaking, have failed to pass upon this issue, either because it was not raised by the pleadings or because its decision was unnecessary. As a general rule, those courts whose decisions have favored the position of respondent have based their decisions upon the ground that employees at ordnance facilities were not engaged in the production of goods for commerce. Under such findings the employment issue becomes moot.

Those courts which have sustained the employee's right of action under the Fair Labor Standards Act have held (if the issue was mentioned in their opinions) that the claimants were not employees of the Government on the authority of *United States* v. *Driscoll*, 96 U. S. 421, 24 L. Ed. 847 (1878) and *Alabama* v. *King & Boozer*, 314 U. S. 1, 86 L. Ed. 3 (1941). An examination of these cases and of subsequent decisions of this court demonstrates that the employee defense may not be summarily dismissed. We believe that recent opinions of this court, notably that in *Lewis* v. *United States*, ... U. S. ....., 91 L. Ed. 595, require that this defense be sustained.

The facts of the Driscoll case show that it is not controlling. There, the Government contracted to purchase granite from Ordway, the owner and operator of certain quarries in Virginia. The contract price was the cost of production, plus 15 per cent. Penalties were prescribed for failure to deliver in accordance with the contract. The

plaintiff, Driscoll, an employee at the quarries, sued the United States in the Court of Claims for wages earned and not paid. This court held that there was no privity between the plaintiff and the United States, and that Ordway employed the plaintiff and alone was required to pay him. The court said:

> "The United States had no interest in the rate or amount paid, save that the sum so paid, with fifteen *per centum* in addition, was the measure of the amount to be paid to Ordway.
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> * * * *
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> "The mode, manner, and rate of Ordway's compensation was a matter between him and the United States, and was one with which the appellee had nothing to do."

In the case at bar, the Government was interested in the rates or amounts paid to employees. It reserved the right and exercised the right to fix the rates of compensation of these employees (R. 51, 52). The contractor was not allowed to deviate from the rates so fixed (See App., O. P. I. 9, 107.1). The Government reserved the right and exercised the right to approve or disapprove the hiring and firing of employees, and to approve or disapprove any changes in their rates of pay or classifications. It furnished the work and determined the number of persons to be employed. The work was performed in a Government-owned plant, with Government tools and machines, with Government materials, and with Government financing. The contractor undertook no financial risk in the enterprise. It was a Government project throughout. The contractor, for a fixed fee, merely furnished management service to the Government. Its fee was not dependent on the amount of money spent or the quantity of munitions produced. There was no penalty prescribed for subnormal production, either as to quantity or quality. If materials were ruined the contractor did not bear the cost of such materials. The Government undertook responsibility for all costs of every kind. It specified the materials to be produced and dictated the manufacturing processes to be used in their production.

The Louisiana Ordnance Plant was a Government-owned, Government-financed war project. The contractor-operator merely furnished supervision and management to the Government. Such contractors have been described as bookkeeping devices and as corporate foremen. No purchase or sale of materials was involved. Title to and possession of the materials, work in progress, and completed items were always in the Government. The Driscoll case merely involved the purchase of materials by the Government from a private producer, the purchase price having been calculated on a cost-of-production basis. It is therefore submitted that the Driscoll case is not controlling on the issue here.

Neither is the case of *Alabama* v. *King & Boozer*, 314 U. S. 1, 86 L. Ed. 3 (1941), controlling. That case involved the constitutional right of a state to impose a sales tax on purchases by a cost-plus-a-fixed-fee construction contractor. The decision there was a logical extension of the principles announced in *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 82 L. Ed. 155 (1937). The case stands for the principle that a tax levied on a Government contractor and measured by his purchases is not discriminatory and not unconstitutional on the ground that it is a tax against the United States. This court stated in its opinion that the contractor was not an agent of the United States in the sense that it could bind the United States for the purchase of materials or otherwise pledge the Government's credit. Even an admitted agent cannot go so far in the absence of express authority.

This is not to say, however, that employees at the Louisiana Ordnance Plant, for purposes of the Fair Labor Standards Act, are not to be deemed employees of the United States.

In enacting the Fair Labor Standards Act the Congress did not intend to regulate wages or hours of employees for whom the Government was responsible. The act is justified under the commerce clause of the Constitution and it applies to *industries* engaged in commerce or in the production of goods for commerce. The Government can pay such wages as it desires to employees for whom it may be responsible. It is presumed to pay a fair and living wage. At any

rate, an act to increase and regulate wages to such employees need not be based upon the commerce clause of the Constitution.

At ordnance facilities the Government dictated the wages paid—not only the basic hourly rate, but the weekly total. It determined whether and in what amount overtime should be paid. It determined whether an employee should be paid by the hour or by the week. The contractor had no discretion and could pay only such amounts as were approved by the Government.

Section 15 of the Fair Labor Standards Act makes it unlawful for any person "to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206, or section 207 of this title". Has the Government, the Secretary of War, the Chief of Ordnance, or any subordinate employee of the Government violated Section 15? The Government not only knew what wages were paid—it dictated their payment. Is the Silas Mason Company liable criminally under Section 15, even though it explicitly followed the instructions of the Government? An affirmative answer logically would seem to follow any ruling in favor of the petitioners in this case.

In the case of *John L. Lewis* v. *United States*, ____ U. S. ....., 91 L. Ed. 595 (1947), this court held that employees in the coal mines seized by the Government under the authority of the War Labor Disputes Act (57 Stat. 163, c. 144, 50 U. S. C. A. App. §§ 1501-1511) were employees of the Government. The case is so clearly in point with the issue in the case at bar that we take the liberty of quoting extensively from the opinion of the court delivered by Mr. Chief Justice Vinson:

> "Congress intended that by virtue of Government seizure, a mine should become, for purposes of production and operation, a Government facility in as complete a sense as if the Government held full title and ownership. • • • The question with which we are confronted is not whether the workers in mines under Government seizure are 'employees' of the federal

Government for every purpose which might be conceived, but whether, for the purposes of this case, the incidents of the relationship existing between the Government and the workers are those of governmental employer and employee.

* * * *

"The defendants, however, point to the fact that the private managers of the mines have been retained by the Government in the role of operating managers with substantially the same functions and authority. * * * The regulations, however, also provide for the removal of such operating managers at the discretion of the Coal Mines Administrator. Thus the Government, though utilizing the services of the private managers, has nevertheless retained ultimate control.

"The defendants also point to the regulations which provide that none of the earnings or liabilities resulting from the operation of the mines, while under seizure, are for the account or at the risk or expense of the Government, that the companies continue to be liable for all Federal, State, and local taxes; and that the mining companies remain subject to suit. The regulations on which defendants rely represent an attempt on the part of the Coal Mines Administrator to define the respective powers and obligations of the Government and private operators during the period of Government control. We do not at this time express any opinion as to the validity of these regulations. It is sufficient to state that, in any event, the matters to which they refer have little persuasive weight in determining the nature of the relation existing between the Government and the mine workers.

"We do not find convincing the contention of the defendants that in seizing and operating the coal mines the Government was not exercising a sovereign function and that, hence, this is not a situation which can be excluded from the terms of the Norris-LaGuardia Act. * * * Under the conditions found by the President to exist, it would be difficult to conceive of a more vital and urgent function of the Government than the seizure and operation of the bituminous coal mines. We

hold that in a case such as this, where the Government has seized actual possession of the mines, or other facilities, and is operating them, and the relationship between the Government and the workers is that of employer and employee, the Norris-LaGuardia Act does not apply."

The separate opinion of Mr. Justice Black and Mr. Justice Douglas contains the following statement:

"We have no doubt that the miners became Government employees when the Government took over the mines. It assumed complete control over the mines and their operation. The fact that it utilized the managerial forces of the private owners does not detract from the Government's complete authority. For whatever control Government agents delegated to the private managers, those agents had full power to take away and exercise themselves."

The case at bar presents a much stronger case to establish the Government-employee relationship than did the Lewis case. Here, the facility was a Government facility in a complete sense, as the Government actually had full title and ownership, as well as possession. Here, also, the Government retained not only ultimate control, but immediate and actual control. Representatives of the Army had complete command of the reservation comprising the plant. (Appx., O. P. I. 50,002.1 and 57,100.3). The Silas Mason Company was hired by the Government to manage its own plant and was required to carry out all Government instructions.

In the Lewis case, the contention that, because the mine operators stood the risk of profit or loss from operation of the seized mines, the employees were employees of the owners was made and overruled. It is clear in the case at bar that all risk of operation was upon the Government. So, too, in the case at bar the operation of the plant was admittedly a sovereign function, duly authorized under the war powers of the Federal Government.

It thus appears that all of the elements present in the Lewis case are present here. Also present in the case at bar are those important elements mentioned in the case of

National Labor Relations Board v. *Atkins & Company*, 331 U. S. 398, 91 L. Ed. 1157, 1165 (1947). This court there said:

> "That relationship (employer-employee) may spring as readily from the power to determine the wages and hours of another, coupled with the obligation to bear the financial burden of those wages and the receipt of the benefits of the hours worked, as from the absolute power to hire and fire or the power to control all the activities of the worker."

The Louisiana Ordnance Plant and other similar ordnance plants were operated under the authority of the Act of July 2, 1940, c. 508, 54 Stat. 712, 50 U. S. C. A. App. § 1171. That act authorizes the Secretary of War to provide for the operation of Government-owned plants "either by means of Government personnel or through the agency of selected qualified commercial manufacturers under contracts entered into with them". In many plants the management services of contractors such as the Silas Mason Company were utilized. In other plants, such as the Pine Bluff Arsenal, at Pine Bluff, Arkansas, the Secretary of War deemed private management services unnecessary.

It is submitted that, regardless of how management is provided, the one plant is as much a Government undertaking as the other, and that the right to relief under Section 16 (b) of the Fair Labor Standards Act cannot be made to depend upon the technical question of who delivers the pay check to the employee. Yet, a decision affirming petitioners' right to relief under the Fair Labor Standards Act will result in just such a distinction, as, admittedly, Section 3 (d) of the act would bar any recovery by an employee at the Pine Bluff Arsenal or at other plants similarly operated.

The war powers of the Federal Government extend to every matter and activity "so related to war as substantially to affect its conduct and progress". *Hirabayshi* v. *United States*, 320 U. S. 81, 93, 87 L. Ed. 1774, 1782 (1943). Under this authority Congress can draft men for battle service. *Arver* v. *United States*, 245 U. S. 366, 62 L. Ed. 349 (1917). Its power to draft business organizations and labor to support the fighting men who risk their

lives can be no less. *United States* v. *Bethlehem Steel Corporation*, 315 U. S. 289, 305, 86 L. Ed. 855, 866 (1942). The Congress, by drafting petitioners for war work, could have required their services in war plants on terms less favorable than they actually received. *Stewart* v. *Kaiser, Co., Inc.*, 71 F. Supp. 551 (D. C., Oreg., 1947).

Does the fact that Congress did not draft petitioners as millions were drafted for military service place the Government in a position less favorable with respect to their claims for additional wages? The Government, by executive action, fixed the wages of these petitioners. Does the mere fact that payment of the wages so fixed was effected through a contractor instead of through a Government finance officer render the Government liable to be mulct for additional billions in wages and penalties? There is no contention in this case that wages actually paid to petitioners were substandard or unfair. These men were well-paid for their services and many escaped military duty by virtue of their employment.

In *Bowles* v. *Willingham*, 321 U. S. 503, 519, 88 L. Ed. 892, 905 (1944), this court said:

> "A nation which can demand the lives of its men and women in the waging of that war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a 'fair return' on his property."

By the same token, we submit, the nation is not required to pay employees in Government-owned war facilities on the same basis as private employers are required to pay their employees.

We earnestly urge that, for purposes of the Fair Labor Standards Act, these petitioners should be regarded as Government employees. The common law tests of the employer-employee relationship are fully met.

Singer Mfg. Co. v. *Rahn*, 132 U. S. 518, 33 L. Ed. 440 (1889);

Rutherford Food Corporation v. *McComb*, 331 U. S. 722, 91 L. Ed. 1350 (1947);

McComb v. *McKay*, ... F. (2) ....., C. C. H. 13 Labor Cases ¶ 64,113 (C. C. A. 8, 1947).

These petitioners possess many more characteristics of a Government employee than do miners in seized coal mines or employees in seized factories. How could the possession and control of the Government have been more complete? It owned the plant and the materials and financed the project. It had the only proprietary interest. It alone had capital risk.

Of interest in this connection, although not directly in point, is *Inland Waterways Corporation* v. *Young*, 309 U. S. 517, 523, 84 L. Ed. 901, 906 (1940). The question at issue was whether a national bank could legally give security for funds deposited by the Waterways Corporation (wholly owned by the United States) under an act authorizing pledges to secure public moneys. In holding the pledges valid this court said:

> "So far as the powers of a national bank to pledge its assets are concerned, the form which Government takes—whether it appears as the Secretary of the Treasury, the Secretary of War, or the Inland Waterways Corporation—is wholly immaterial. The motives which lead Government to clothe its activities in corporate form are entirely unrelated to the problem of safeguarding governmental deposits, and therefore irrelevant to the issue of ultra vires. Compare *United States ex rel. Skinner & E. Corp.* v. *McCarl*, 275 U. S. 1, 8, 72 L. Ed. 131, 135, 48 S. Ct. 12. The true nature of these modern devices for carrying out governmental functions is recognized in other legal relations when realities become decisive. Compare *Clallam County* v. *United States*, 263 U. S. 341, 68 L. Ed. 328, 44 S. Ct. 121; *Emergency Fleet Corp. United States Shipping Bd.* v. *Western U. Teleg. Co.*, 275 U. S. 415, 72 L. Ed. 345, 48 S. Ct. 198. The funds of these corporations are, for all practical purposes, Government funds; the losses, if losses there be, are the Government's losses. Compare *United States Grain Corp.* v. *Phillips*, 261 U. S. 106, 113, 67 L. Ed. 552, 555, 43 S. Ct. 283."

In *Cherry Cotton Mills* v. *United States*, 327 U. S. 536, 539, 90 L. Ed. 835, 838 (1946), the Government was permitted to plead as a counterclaim the debt owning by the

petitioner to the Reconstruction Finance Corporation. The latter corporation was characterized as follows:

> "Its Directors are appointed by the President and affirmed by the Senate; its activities are all aimed at accomplishing a public purpose; all of its money comes from the Government; its profits if any go to the Government; its losses the Government must bear. That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by Government to accomplish purely Governmental purposes."

The advantages enjoyed by circumventing conventional executive agencies in the accomplishment of purely Governmental functions have induced the Government to an increasing extent to make use of independent corporate facilities. For a list of corporations carrying on purely Governmental activities, see footnote 3 in *Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381, 390, 83 L. Ed. 784, 789 (1939).

The fact that Silas Mason Company was not wholly owned by the Government does not affect the situation. That the Secretary of War, by Congressional authority, chose to retain respondent to manage one of the Government's war plants does not in the least change the characteristics of that plant so as to make a private enterprise of what was purely a Governmental undertaking. Respondent was merely the agency selected by the Government to accomplish purely Governmental purposes. As indicative of the relationship between the Government and the respondent, we have set forth in an appendix brief extracts from the Ordnance Procurement Instructions, a compilation of instructions issued by the Department of Ordnance, pursuant to authority conferred by the Secretary of War for the use and guidance of Ordnance Procurement officers such as the contracting officer in charge of the Louisiana Ordnance Plant.

We submit that the petitioners were, for purposes of this case, employees of the Government and therefore are foreclosed from maintaining suit under the Fair Labor Standards Act.

II

EMPLOYEES AT GOVERNMENT-OWNED ORDNANCE FACILITIES ARE NOT ENGAGED IN PRODUCTION OF MUNITIONS FOR COMMERCE.

Petitioners base their case solely on the ground that they were engaged in the production of goods for commerce. They make no claim that they were engaged in commerce.

Many District Courts and several of the Circuit Courts of Appeal have passed upon this issue, either directly or inferentially.

The question, simply stated, is whether a shipment by the United States in its sovereign capacity of its own property across state lines for defense of the nation in time of war constitutes commerce.

As pointed out by District Judge Lemley in his exhaustive opinion in the case of *Barksdale* v. *Ford, Bacon & Davis, Inc.*, 70 F. Supp. 690 (E. D., Ark. 1947), the question has been answered in the negative in the following cases: *H. B. Deal & Co., Inc.*, v. *Leonard*, 210 Ark. 512, 196 S. W. (2) 991 (1947); *National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. (2) 780 (C. C. A. 9, 1940); *Fox, et al.*, v. *Summit King Mines, Limited*, 143 F. (2) 926 (C. C. A. 9, 1944); *Walling* v. *Haile Gold Mines, Inc.*, 136 F. (2) (C. C. A. 4, 1943), when read in connection with the opinion of the District Court in *Holland* v. *Haile Gold Mines, Inc.*, 44 F. Supp. 641 (1942); *Ritch* v. *Puget Sound Bridge & Dredging Co., et al.*, 156 F. (2) 334, (C. C. A. 9, 1946), when read in connection with *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 60 F. Supp. 670 (W. D., Wash., 1945); *Clyde* v. *Broderick et al.*, 144 F. (2) 348 (C. C. A. 10, 1944), in connection with *Clyde* v. *Broderick*, 52 F. Supp. 533 (D. C., D. Col., 1943). Later decisions to the same effect are *Crabb* v. *Welden Brothers*, 164 F. (2) 797 (C. C. A. 8, 1947), *Divins* v. *Hazeltine Electronics Corp.*, 163 F. (2) 100 (C. C. A. 2, 1947), and that of the Fifth Circuit in the case at bar. It is thus seen that the proposition that such shipments are not commerce finds either direct or inferential support in decisions by the Supreme Court of Arkansas and by the

Circuit Courts of Appeal of the Second, Fourth, Fifth, Eighth, Ninth, and Tenth Circuits.

The Government, in producing munitions for the armed forces, was not producing goods for commerce. It was exercising the power "to raise and support Armies" conferred by Article I, Section 8, of the Constitution. This was as much a part of the national defense as was the recruiting and transporting of an army overseas. Both powers arise under the same constitutional provision. Production of component parts by the Government in this country for delivery overseas was no more for commerce than final assembly and timing of a bomb in England by the military for delivery in Berlin.

There can be no doubt that production at the Louisiana Ordnance Plant was by the Government and for the Government, irrespective of whether the personnel doing the actual work were Government employees or employees of an independent contractor. Clearly, the Government was the producer of the munitions. Therefore, if the Government was not producing for commerce, it logically follows that petitioners were not producing for commerce.

Previous decisions of this court make it clear that production of munitions by the Government for war purposes is not production for commerce, and the transportation thereof by the Government across state lines and into foreign countries is not commerce as that term is used in the Constitution or in the Fair Labor Standards Act. To this effect is the case of *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401, 406, 81 L. Ed. 306, 309 (1937), wherein it was held that the Federal Government, by shipping merchandise in the exercise of its sovereign functions, is not engaged in commerce, even though the Government incidentally in connection with its Governmental functions commercially transported merchandise for others. The case involved the question whether the salary of Rogers, as general counsel for the Panama Railroad Company, was subject to state taxation. The railroad was incorporated under the laws of New York. Coincident with acquisition of the Panama Canal Zone in 1904, the Government purchased all of the stock of the railroad company. The company operated a railroad across the Isthmus and a dairy

and two hotels in connection therewith, and a line of steamships between New York and the Canal Zone. During the construction of the canal the railroad was almost exclusively employed as an adjunct of such construction, although it was incidentally used for commercial transportation. After completion of the canal, the use of the railroad, chiefly as an adjunct to the management and operation of the canal, was continued. In holding that the railroad exercised functions of a Governmental character and not of a commercial character, this court said:

> "That under these laws, the creation, management and operation of the canal are all governmental functions and the laws well within the constitutional power of Congress to provide for the national defense and to regulate commerce under the commerce clause of the Constitution, does not admit of doubt.
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> * * * *
>
> "The building and operation of a bridge or a road or a canal is not commerce in the substantive sense, but is the creation and use of a physical thing as a medium by and through which commerce is regulated, since such creation and use condition and facilitate transportation. *Luxton* v. *North River Bridge Co.*, *supra*, pp. 533, 534; *Pensacola Teleg. Co.* v. *Western U. Teleg. Co.*, 96 U. S. 1, 9, 10, 24 L. Ed. 708, 710; cf. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 297, 80 L. Ed. 1160, 1181, 56 S. Ct. 855. In recognition of the principle established by these and other decisions, this court in *Wilson* v. *Shaw*, 204 U. S. 24, 33, 51 L. Ed. 351, 356, 27 S. Ct. 233, sustained the acquisition, construction and maintenance of the canal as within the commerce power of the federal government.
>
> "Such being the status of the canal, it requires no argument to demonstrate that all auxiliaries primarily designed and used to aid in its management and operation, and which have that effect, partake of its nature and are themselves co-operating regulators—or, perhaps more accurately speaking, constitute, with the canal, a single great regulator—of national and international commerce. And this, we think, is the effect of

the interrelation of the railroad company's activities with the management and operation of the canal.

* * * * *

"*Second.* The power of the Federal Government to use a corporation as a means to carry into effect the substantive powers granted by the Constitution has never been doubted since *M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. Ed. 579. The Panama Rail Road Company was acquired and has been utilized in virtue of that power."

In *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 80 L. Ed. 688 (1936), although recognizing that the Government cannot constitutionally engage in a commercial business, the court upheld the right of the Government to generate, sell, and distribute electric power made available by the construction of dams for flood control and navigation. Justifying the construction of the TVA improvements under both the war and regulation of commerce powers, the court said that the distribution of electric power thus created was not engaging in commerce, but merely was the disposition of surplus Government property. The court observed that should the Government undertake to mine gold, silver, or other minerals from the public domain it would not thereby be engaged in commerce in violation of the Constitution.

The Government, in its defense efforts, was engaged in war and not in commerce. In sending men and materials to foreign shores it was not engaging in commerce as that term is generally understood or as it is used in the Fair Labor Standards Act. The production of munitions for military use was as much a part of war as was the use of those munitions on the field of battle. The intervention of a private contractor, whether an independent one or otherwise, in the production processes does not alter the nature of the enterprise. The Government, had it elected to do so, could have used men in military uniform to man the machines at the Louisiana Ordnance Plant. The Government did, as a matter of fact, operate many of its own plants with Government-paid personnel.

We have never heard it contended that Government personnel in Government-owned arsenals were engaged in

the production of goods for commerce. Obviously, such plants are not engaged in production of goods for commerce within the intent of the Fair Labor Standards Act. By the same token, the employees at the Louisiana Ordnance Plant were not engaged in production of goods for commerce. The plant, the tools, equipment, and the raw materials were all owned by the Government. The production of the plant was Government property. Never for one moment was title to any products vested in anyone other than the Government. Does the operation become commerce or production for commerce merely because the Government sought assistance from a private agency in the operation of its own plant? There was no purchase or sale of munitions in this case. The Silas Mason Company merely furnished management to the Government for a fixed fee (See Appx., O. P. I. 9101.1). It was performing a service as distinguished from the selling of merchandise. The project was still a Governmental function. The Government was the producer, not the contractor.

When the Government operates its own plant it must of necessity employ one or more individuals to manage the plant so as to keep it operating. Management includes the responsibility of hiring and firing personnel. The fact that in the one instance employees are paid by the management and in the other by direct Government check is not a distinguishing factor. In each case the money originates in the same place—the public treasury. The important thing is that at all times during the processing of the materials title and possession are in the Government and that the completed items are produced and used for a Governmental purpose and not for commerce.

If it be admitted that the Government is not engaged in production for commerce when it produces munitions for the national defense at its own plants through its own employees without the intervention of a private contractor, then we submit that it follows as a necessary corollary that the Government was not engaged in production for commerce at the Louisiana Ordnance Plant. Both types of operation were authorized by the same act of Congress and were under the direct supervision of the Secretary of War.

However, should the manufacture of the munitions be considered as something apart from Government enterprise, still it was not production for commerce.

This court has consistently recognized the distinction between manufacture and commerce. The former is subject to regulation by Congress only in so far as it relates to the latter. *Carter* v. *Carter Coal Co.*, 239 U. S. 238, 239, 80 L. Ed. 1160, 1182 (1936). This distinction was recognized in *United States* v. *Darby*, 312 U. S. 100, 85 L. Ed. 609 (1941), wherein the constitutionality of the Fair Labor Standards Act was sustained. The wages and hours provisions of the act were justified only by virtue of the power of Congress to restrict commerce as an appropriate measure in its regulation.

In the Carter Coal Co. case, *supra*, the court said that commerce is the equivalent of "intercourse for the purposes of trade". The same thought was expressed in the Darby case, *supra*. We quote from the opinion at pages 115 and 122 of the official reports:

> "The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, * * *."
>
> * * * *
>
> "The Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as 'unfair', as the Clayton Act has condemned other 'unfair methods of competition' made effective through interstate commerce."

Therefore, assuming that petitioners and respondent were engaged in production, still their production was not for commerce. It was not for purposes of trade, as it was not for sale, barter, or exchange. Neither did it compete with other munitions in commerce. The munitions never entered commercial channels as that phrase is ordinarily understood and used. It was not the type of industry that Congress had in mind in enacting the act. It is not neces-

sary in this case to speculate on the applicability of the act had the munitions been manufactured and sold to the Government. In such a case trade in the commercial sense is involved.

In the case at bar no sale was ever made either before or after delivery. The fixed fee paid to the Silas Mason Company was in the nature of salary for services rendered, just as is a salary any proprietor pays to his servant or to the manager of his place of business. It was not payment for goods sold and delivered, but payment for services rendered.

District Judge Taylor, in *Young v. Kellex Corporation*, ... F. Supp. ....., C. C. H. 14 Labor Cases ¶ 64,244 (E. D., Tenn., 1948), made the following appropriate comment in a case involving the Atomic Bomb Plant at Oak Ridge, Tennessee:

> "As near as a thing could be so made, the atomic bomb was produced by the United States as a government and a people. Its making was financed by the Government. Title to basic materials and finished product was at all times in the Government. From inception of the idea of producing a bomb to delivery of the bomb on its military objectives, there was unrelaxing supervision and direction by the Government. Though for reasons deemed sufficient to the Government, private corporations were employed in construction and production processes, the sovereign was always present as general owner, directing the work, directly or indirectly paying all bills, receiving the finished product into its exclusive custody. And though the atomic bomb moved across state lines, it entered into no commercial competition. It remained everywhere in Government custody and was everywhere impressed with the sovereign character, and never did it remotely become merchandise, as that term is understood in judicial decisions and in the commercial world."

It is respectfully submitted that the petitioners were not engaged in the production of goods for commerce, first, because transportation of the munitions was an administrative act of the sovereign authorized under its war powers,

and did not constitute transportation in commerce, and, second, because the munitions were not produced for sale or trade, did not enter commercial competition, and their production was, therefore, not for commerce as that term is used in the Fair Labor Standards Act.

III

MUNITIONS PRODUCED AT GOVERNMENT-OWNED ORDNANCE FACILITIES ARE NOT GOODS AS DEFINED IN THE FAIR LABOR STANDARDS ACT.

To the casual observer this argument may appear colorable only. On reflection, however, its merit is obvious. The definition of "goods" in Section 3 (i) of the act shows conclusively that Congress was aiming only at goods or merchandise that entered channels of commerce or trade and not at such articles as are produced for the ultimate consumer from materials furnished by that consumer. It is clear from the act that the term "ultimate consumer" does not include one who incorporates the items produced into other items which themselves enter the channels of commerce.

The defense has been sustained in the following cases: *Barksdale* v. *Ford, Bacon & Davis, Inc.*, 70 F. Supp. 690, 693 (E. D., Ark., 1947); *Anderson* v. *Federal Cartridge Corporation*, 72 F. Supp. 644 (D. Minn., 1947); *Kruger* v. *Los Angeles Shipbuilding and Drydock Corporation*, ... F. Supp. ....., C. C. H. 12 Labor Cases ¶ 63,660 (S. D., Calif., 1947); *Lynch* v. *Embry-Riddle Co.*, ... F. Supp. ....., C. C. H. 10 Labor Cases ¶ 62,923 (S. D., Fla., 1945); *Divins* v. *Hazeltine Electronics Corporation*, 163 F. (2) 100 (C. C. A. 2, 1947); *Crabb* v. *Welden Brothers*, 164 F. (2) 797 (C. C. A. 8, 1947) and by the Fifth Circuit in the case at bar. It thus appears that the Courts of Appeal for the Second, Fifth, and Eighth Circuits have approved the principle here urged. We are aware of no Federal appellate court decision to the contrary. The issue does not appear to have been presented in the case of *Bell* v. *Porter*, 159 F. (2) 117 (C. C. A. 7, 1946).

The Department of Labor in the court below in this case and in other cases has urged that the ultimate consumer exclusion of Section 3 (i) was intended solely to

protect the purchasing consumer from the application of Section 15 (a) (1). It stated that the exemption was intended to protect a private individual who carries personal articles produced in violation of the statute from one state to another. This is a strained interpretation of the ultimate consumer exclusion. The penalties of the act apply only to a wilful violater. Obviously, the ordinary private individual can have no personal knowledge of the wages paid or hours worked by employees of the manufacturer of an article, and the probability that such an individual might have such knowledge is too fantastic to suggest that Congress may have had such a situation in mind in adopting the exclusion clause.

The Department of Labor also urged that the exclusion was not applicable because, if it be assumed that the munitions being produced had already been delivered into the possession of the United States, then the United States became a producer, manufacturer, or processor thereof. But, if this be true, then the employees were employees of the United States and are excluded under Section 3 (d) of the statute.

Although the Administrator of the Wage and Hour Division has contended that an adoption of respondent's arguments would seriously embarrass the Administrator in administration of the act, he has never pointed out any situation wherein a judgment favorable to respondent would have any importance in the administration of the act, except in cases of Government-owned plants. The fears of the Administrator are wholly unfounded.

As has been heretofore mentioned, regardless of the outcome of this case, the Government, if it desires, can establish in the future any wage and hour regulations it desires for application to its own plants. Should it desire to pay overtime, it need not rely for authority on the Fair Labor Standards Act.

It is apparent that the Government did not desire to pay petitioners any additional compensation for past services, as, during the time the petitioners worked, their wages and hours were fixed by the Chief of Ordnance, who acted for the Secretary of War and the President. *Wilcox* v. *Jackson*, 13 Pet. 498, 10 L. Ed. 264 (1839); *United States*

v. *Clarke*, 20 Wall. 92, 22 L. Ed. 320, 323 (1874). This is further borne out by the fact that the President acting through the Secretary of War and the Chief of Ordnance instructed the contractor to defend these claims. If the Government desired to pay the claims here asserted, certainly it would not go through the mechanics of litigation, but would pursue the economical method of settlement without judicial intervention.

It is, therefore, submitted that the court should give effect to the plain terms of Section 3 (i) by declaring that the munitions upon which petitioners worked were not goods within the meaning of the Fair Labor Standards Act.

CONCLUSION

In conclusion, we respectfully submit that the judgment of the Court of Appeals is correct and should be affirmed.

Three principal grounds have been urged in support of the judgment of the lower court. First, it is contended that under the Fair Labor Standards Act petitioners occupied the status of Government employees. Second, it is argued that the production of munitions under the circumstances of this case was not production for commerce because (a) the transportation of the munitions was an administrative act accomplished by the Government in aid of its war powers, and, therefore, was not transportation in commerce within the meaning of the Fair Labor Standards Act, and (b) the munitions were not produced for sale or trade, did not enter commercial competition, and, therefore, were not shipped in commerce. Third, it is urged that under the plain provisions of the act the munitions did not constitute "goods".

It is submitted that each of these supporting arguments is well taken, but attention is invited to the fact that if the respondent prevails on any one of these propositions the judgment should be affirmed.

Respectfully submitted,

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APPENDIX

EXCERPTS FROM ORDNANCE PROCUREMENT INSTRUCTIONS

50,001.1 New Ordnance Facility.—The term "New Ordnance Facility" means a Government-owned, contractor-operated plant under the jurisdiction of the Ordnance Department.

• • • • •

50,002.1 In the case of new Ordnance facilities and contractor-operated Field Service depots, the contracting officer's representative appointed by the contracting officer administering the operating contract will also be appointed the commanding officer of the station. Since the station is a Class IV installation under AR 170-10 as amended, he will be guided by the provisions of pertinent Army Regulations.

• • • • •

50,105-2 In the administration of cost-plus-a-fixed-fee contracts under which the contracting officer has authority to designate the point at which title will pass to the Government, the contracting officer, in accordance with PR 1182-C, will direct the contractor to cause delivery to be taken by the Government and title to materials and supplies to vest in the Government at the point of origin, subject to final inspection and acceptance at destination. Such power will be exercised unless savings will not be realized thereby under all the circumstances or unless, in the judgment of the contracting officer, such action will definitely, demonstrably and materially interfere with or delay performance of the contract in view of the administrative or other difficulties involved.

• • • • •

53,005.1 Reference is made to ASF Manual M404, AR 55-155 and AR 55-150. Government bills of lading on outbound shipments must be signed either by the transportation officer issuing such bills of lading or by his designated civilian assistant who must be an employee of the War Department. At CPFF establishments it is recommended that the preparation of Government bills of lading be made by the contractor for the signature of the transportation officer or his designated assistant.

• • • •

53,009.1 On all contracts it will be the responsibility of the establishment administering the prime contract to designate an Accountable Property Officer within their organization to be accountable for all property in connection with that contract.

• • • •

57,100.3 Commanding Officer's Responsibility.—Government-owned contractor-operated plants are military reservations. Commanding officers appointed by War Department orders are responsible for the safety of all personnel and Government property. The following is an extract from AR 210-10:

4. • • • b. He will be responsible for

(1) The safety and defense of the post. • • •

(4) The reservation, proper application, and use of public property.

(5) The strict enforcement of laws and regulations. • • •

(9) The guarding of the public interests in every particular.

It is, therefore, important that all commanding officers issue regulations that will insure the maximum protection to all personnel and to Government property in any event. These general regulations should be cooperatively issued by the contractor and the commanding officer. The commercial safety experience is ordinarily with the contractor and the military responsibility is in the commanding officer. The enforcement of these rules is discussed in OPI 57,002.

• • • •

8,405.2 An exemption is authorized from the tax imposed by Section 3475 of the Internal Revenue Code (26 U. S. C. 3475) as to the payment for transportation of property to or from the Government of the United States shipped on a United States Government bill of lading. (Order of the Secretary of Treasury dated 29 April 1944, Federal Register 2 May 1944, Vol. 9, No. 87, F. R. Doc. 44-6128.)

8,405.3 Contracting officers, in administering cost-plus-a-fixed-fee contracts, are not, for the sole purpose of avoiding the payment of the Federal transportation tax, to arrange for the transportation of property upon the United States Government bill of lading. It should be noted in this connection that the payment of the transportation tax by a cost-plus-a-fixed-fee contractor and a subsequent reimbursement of the contractor by the Government merely transfers funds from one Government agency to another.

• • • • •

9,101.1 Statement of Labor Policy Dated June 22, 1942.

The War and Navy Departments on June 22, 1942, issued a Statement of Labor Policy governing Government-owned, privately-operated plants, the backbone of the Nation's armament program. Under the terms of the Congressional mandate by which their construction and operation was authorized, the War and Navy Departments were given the option of themselves operating the plants or of operating them through the agency of selected qualified commercial contractors. The War Department chose the latter course and in doing so created industrial units of a novel and peculiar character. They have many significant features which combine to form a unique relationship between the operating contractor and the War Department and consequently the handling of many problems, including that of labor relations, must necessarily be slightly different than in the case of wholly private plants. The primary responsibility for dealing with problems relating to the employment of labor is with the contractor since he is hired for the express purpose of utilizing his skill and experience in running the plant and taking care of all questions of personnel. Because of the relationship which obtains, however, the War Department has the responsibility to see that each plant is operated in accordance with all laws and Executive Orders, and in such a manner as to provide for the safety and protection of the plant and its personnel, and to insure maximum production at a reasonable cost. The various provisions of the Statement of Labor Policy, dated June 22, 1942, are referred to in the provisions of this section which follow.

• • • •

9,107.1 War Department Responsibility:

The War Department has contractual responsibility for the approval of pay-roll costs. Thus, notwithstanding approvals by the War Department Wage Administration Agency under the Executive Orders and statute dealing with national wage and salary stabilization, approvals by the contracting officer's representatives are also required for purposes of reimbursement of expenditures made pursuant to initial wage and salary scales and any adjustments therein, save only of such individual adjustments within established and approved wages and salary ranges as are permitted without approval pursuant to OPI 9,107.3 and OPI 9,107.4 (not including individual adjustments in salaries in excess of $6,000 covered by OPI 50,006.1).

• • • •

57,200.7 Jurisdictional status of Ordnance establishments.—The Office of the Chief of Engineers reports that the Federal Government has attained exclusive jurisdiction in certain establishments over which the Chief of Ordnance has retained responsibility in plant protection matters. The following list will be amended from time to time as jurisdiction is obtained at additional plants. Inquiry as to the present jurisdictional status of establishments not listed hereafter may be addressed to Safety and Security Branch, Washington Liaison Office, Attention of Legal Unit, Office of the Chief of Ordnance, Washington, D. C.

Name	Exclusive Jurisdiction
• • • •	
Louisiana Ordnance Plant	10-10-42
• • • •	

BRIEF AMICUS CURIAE

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 590

HARRIS KENNEDY, ET AL.,

Petitioners,

versus

SILAS MASON COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF E. I. DU PONT DE NEMOURS & COMPANY AS AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: PAGE

UNITED STATES STATUTES

CONGRESSIONAL MATERIAL PAGE

MISCELLANEOUS

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The written consent of Petitioners and Respondent to the filing of this brief has been filed with the Clerk.

PRELIMINARY STATEMENT

During the period from 1940 to 1945, E. I. du Pont de Nemours & Company constructed and operated for the United States Government, under cost-plus-a-fixed-fee contracts, nine Government-owned ordnance plants.[1] In connection with its

[1] The Chickasaw Ordnance Works at Memphis, Tennessee; the Indiana Ordnance Works at Charlestown, Indiana; the Alabama Ordnance Works at Birmingham; the Oklahoma Ordnance Works at Tulsa; the Gopher Ordnance Works at St. Paul, Minnesota; the Wabash River Ordnance Works at Terre Haute, Indiana; the Kankakee Ordnance Works at Joliet, Illinois; the Hanford Engineering Works at Hanford, Washington; and the Morgantown Ordnance Works at Morgantown, West Virginia.

operation of these plants the Company has been sued in numerous places by large numbers of employees asserting claims under the Fair Labor Standards Act. Still pending in various federal courts are claims of 3500 or more employees for sums which exceed $10,000,000. The factual situations in these cases are essentially the same as that here. In each of them the Company has asserted, among other defenses, that plaintiffs are not entitled to recover under the Act because the munitions upon which they worked were not "goods" within the meaning of the Act, and because the munitions were not produced for "commerce" within the meaning of the Act. Both of these propositions are involved in the instant case.

The du Pont Company believes that it will be reimbursed under its cost-plus-a-fixed-fee contracts for any judgments which may be rendered against it in the above proceedings. In those contracts, however, it agreed that it would at all times protect the interest of the Government. It is therefore filing this brief urging that the decision below be affirmed upon the ground that the Court held correctly that Petitioners were not engaged in the production of "goods" for "commerce" within the meaning of the Fair Labor Standards Act.

No position is taken upon the question whether Respondent was an independent contractor or an agent of the Government, or upon the question whether Petitioners were employees of the Respondent or of the Government.

STATEMENT OF THE CASE

Petitioners' and Respondent's statements of the case are accepted, with the one exception that Petitioners' statement (Br. p. 4) that "The Silas Mason Company bought the raw materials in the open market," appears to be inaccurate. The record indicates that all component parts of the ammunition[2] assembled

[2] 20 mm shells, 15 mm shells, 100 lb. bombs (R. 26), mines, 3" shells, 500 lb. bombs (R. 160), minor and medium caliber ammunition, 250 lb. bombs, fuses, boosters (R. 172–173), 4.2" chemical mortar shells (R. 186).

at the Louisiana Ordnance Plant, including shipping materials and containers, were furnished by the Government, as Government property, and shipped by the Government to the plant when and as requisitioned from time to time by Respondent (R. 21, 45).

In addition to the facts set forth in Petitioners' and Respondent's statements and in the record, it is respectfully requested that the Court take judicial notice of *Ordnance Procurement Instructions*, issued by direction of the Chief of Ordnance on November 30, 1942, pursuant to the authority conferred upon him by paragraphs 107.9 and 107.10 of War Department Procurement Regulations, as in effect December 1, 1942, and particularly Parts 50 and 57 thereof, excerpts from which are attached hereto as an Appendix.[3] These regulations evidence that the Government, through the War Department, was physically present at the Louisiana Ordnance Plant throughout the period in question and in actual physical possession of the plant and all equipment and materials located on the premises.

It is further requested that the Court take judicial notice of a directive issued by order of the Chief of Ordnance on July 29, 1942, signed by R. W. Johnson, Colonel, Ordnance Department, containing a Statement of War Department Labor Policy to all Government-Owned, Contractor-Operated Facilities, and, in particular the following statements therein contained:

> "Congress has charged the War and Navy Departments with the responsibility for the operation of nearly 100 giant Government-owned munitions plants, the backbone of the Nation's armament program. * * *
>
> "All are owned outright by the United States, and all but a very few are located upon military reservations. All are engaged solely in war production—the manufacture

[3] The Court may take judicial notice of Ordnance Procurement Instructions. *Standard Oil Co. of California* v. *Johnson*, 316 U.S. 481, 483, 484.

and loading of explosives and ammunition, the assembly of bombers and the fabrication of guns and other munitions. In all of the plants the work performed is of a secret or confidential nature, and in many of them it is highly hazardous. All are operated by private contractors under 'Management Service' contracts, any of which may at any time be terminated by the Government if it should decide either to operate the plant itself or to entrust its operation to another contractor. The normal factors which go to make up commercial profit are lacking. The Government has title to the product at all times. It pays the contractor a fixed fee for its services which fee is unaffected by wages or other costs, production delays or stoppages. The Government reimburses the contractor for all costs, including wages, and in most instances must approve such costs, including wage scales, in advance. The Army or Navy officer in charge may direct the discharge of any employee if he deems it to be in the public interest. These plants embody a new and unique tripartite relationship among Government, Labor, and Management. They are sufficiently different from traditional Government establishments so that existing Government policies regulating labor relations are not entirely suitable."

SUMMARY OF ARGUMENT

The decision of the court below that Petitioners were not engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act should be affirmed for the following reasons:

I

The background and legislative history of the Act, the Congressional findings and declaration of policy, and the decisions of this Court show that the evil sought to be remedied by the Act was the spread of substandard labor conditions through the use of the facilities of interstate commerce. Goods produced under substandard conditions moved across state lines and competed unfairly with goods produced under better condi-

tions. It was the intention of Congress to suppress this competition by regulating the interstate distribution of goods which competed with other goods in a commercial sense. Congress did not intend the Act to be applicable to goods, such as Government-owned munitions of war which, though transported across state lines, did not and could not in any manner compete with other goods. Contrary to the suggestion of Petitioners, it was indicated during the debates on the Portal-to-Portal Act that there was considerable doubt whether the Fair Labor Standards Act, as distinguished from the Walsh-Healey and other Federal Acts, was applicable to Government-owned ordnance plants of the kind involved here.

II

The general definition of "goods" in Section 3 (i) of the Act itself shows that the goods with which the Act is concerned are articles or subjects of commerce in the generally recognized commercial sense. Articles produced solely for war, such as shells and bombs, are the exact opposite of the goods to which the Act was intended to apply. Warships, for example, have been held not to be goods within the general definition, even though "ships" are expressly included.

III

Even if Petitioners produced "goods" within the general statutory definition, the ammunition was not "goods," because it falls within the exclusory clause of Section 3 (i) of the Act. This Section defines "goods" so as to exclude goods after delivery to the ultimate consumer other than a producer, manufacturer or processor. The exclusory clause defeats Petitioners' claims whether it be applied to the finished ammunition or to the component parts of the ammunition.

The finished ammunition was covered by the exclusory clause because it was delivered to the Government, the ultimate consumer, at the plant site prior to shipment out of the state. The

Government was not a producer because it did nothing but ship and consume the ammunition. Since the ammunition lost its character as "goods" prior to shipment, there was no transportation of goods in commerce and consequently no production of goods for commerce.

The component parts of the ammunition were likewise covered by the exclusory clause because they came into the possession of the Government at or prior to the time when they were first delivered to the plant site. The Government was certainly the ultimate consumer of the parts. Petitioners concede, in fact they insist, that the Government was not the producer. But whether or not the Government was the producer, it was still the ultimate consumer because it actually consumed everything which came into its possession and nothing remained. The exception for the producer, manufacturer or processor contained in the exclusory clause was clearly designed for the apparent ultimate consumer who consumes goods but in so doing produces other goods which leave his possession and are not consumed by him.

IV

If Petitioners produced "goods" at all, they did not produce them for commerce. They produced ammunition for the Government to be shipped by the Government from the plant site. The Government in so shipping the ammunition was exercising its power to wage war, which is the exact opposite of engaging in commerce. The commerce power was delegated to the Government by the people. It is a power to regulate commerce among the people, and not a power given by the people to the Government to regulate itself. The war power, on the other hand, is inherent in the Federal Government, and in wartime is supreme. When the Government ships ammunition across state lines it is acting solely under the war power. It is inconceivable that the Constitution was framed so as to permit a head-on collision between the war and commerce powers. Yet this is the necessary result if it be held that action taken pursuant to the

war power is commerce and therefore subject to the regulation of the commerce power.

If it wishes, Congress admittedly may subject war activities to earlier enacted Commerce Clause regulations, such as the Fair Labor Standards Act, but it must do so under the war power and not under the commerce power. No such step was taken here.

Since it is apparent that shipment by the Government of its own ammunition under the circumstances involved here was an activity under the war power and not commerce, the Fair Labor Standards Act, being an exercise of the commerce power alone, does not apply to it.

ARGUMENT

POINT I

CONGRESS INTENDED THE FAIR LABOR STANDARDS ACT TO APPLY ONLY WITH RESPECT TO GOODS MOVED INTERSTATE IN COMPETITION WITH OTHER GOODS IN A COMMERCIAL SENSE.

The background and legislative history of the Fair Labor Standards Act, the findings and declaration of policy set forth in Section 2 thereof, the provisions of the Act itself, and the decisions of this Court construing the Act, demonstrate that Congress intended the Act to be applicable in respect of goods moving across state lines in competition with other goods in a commercial sense. Congress did not intend the Act to be a regulation of the movement across state lines of Government-owned munitions which do not and could not in any manner compete with other goods moving across state lines. The labor conditions under which such munitions were produced could not possibly affect other goods competitively by their subsequent movement from one state to another.

The general purpose of federal wage and hour legislation is readily apparent from the legislation introduced and enacted as a result of the depression of the 1930's. The hearings before Congressional committees held in connection with the proposed 30-hour week bills[4], The National Industry Recovery Act[5], the Ellenbogen Bill for the regulation of the textile industry[6], the First Guffey Coal Act[7], and the Fair Labor Standards Act itself are replete with statements as to the unfair competitive advantage accruing in interstate markets to employers with lower labor standards.

The first attempt to solve the problem on a broad scale was the National Industrial Recovery Act. When this Act was invalidated, Congress determined that it could require proper labor standards at least from those who would do business with the Government. It enacted the Walsh-Healey Public Contracts Act[8], providing that Government contracts be awarded only to persons who would comply with certain minimum standards, including minimum wages and maximum hours.

In May, 1937, the President requested Congress to take further action with respect to labor conditions. He pointed out that unrestrained interstate competition produced serious social consequences and recommended that the channels of interstate commerce be closed to goods produced under conditions which did not meet certain standards. The bills which became the Fair Labor Standards Act were introduced.

The major testimony in the extensive Congressional hearings on the bills proves that the heart of the problem, so far as the

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[4]H.R. 14518, 72d Cong., 2d Sess.; H.R. 4557, 73d Cong., 1st Sess.; H.R. 8492, 73d Cong., 2d Sess.; H.R. 7198, 74th Cong., 1st Sess.; see H. Repts.: No. 1999, 72d Cong., 2d Sess.; No. 24, 73d Cong., 1st Sess.; No. 889, 73d Cong., 2d Sess.; No. 1550, 74th Cong., 1st Sess.

[5]48 Stat. 195.

[6]H.R. 9072, 11770, 12285, 74th Cong., 2d Sess.; H. Rept. No. 2590, 74th Cong., 2d Sess.; H.R. 238, 75th Cong., 1st Sess.

[7]49 Stat. 991.

[8]49 Stat. 2036.

national economy was concerned, was that goods produced under substandard conditions moved across state lines in competition with other goods and in this manner the substandard conditions were spread.[9]

The Committee Reports on the bill which became the Fair Labor Standards Act are to the same effect. For example, the House Committee Report, No. 2182, 75th Cong., 3rd Sess., p. 7, summarizes the facts upon which the legislation rests:

> "Section 2 of the committee amendment contains a statement of the effect which the maintenance of substandard labor conditions exerts on interstate commerce. This finding is abundantly supported by the testimony at the joint hearings held on H.R. 7200 and S. 2475 during the first session of the Seventy-fifth Congress. The hearings indicate (1) that the maintenance of substandard labor conditions in a particular industry by a few employers necessarily lowers the labor standards of the whole industry, and that this lowering of the standards is brought about by reason of the fact that the channels of interstate commerce have been open to goods produced under substandard labor conditions; * * *"

The Senate Committee Report, No. 884, 75th Cong., 1st Sess., pp. 4–5, contains the following statement:

> "This law proposes to accomplish this purpose by closing the channels of interstate commerce to goods produced under conditions which do not meet the rudimentary standards of a civilized democracy. * * * It applies only to the industrial and business activities of the Nation insofar as they utilize the channels of interstate commerce, or seriously and substantially burden or harass such commerce."

The Fair Labor Standards Act itself outlines its objectives as follows:

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[9] Joint Hearings Before the Senate Committee on Education and Labor and the House Committee on Labor, 75th Cong., 1st Sess., on S. 2475 and H.R. 7200, pp. 93–95, 111, 127, 134, 140, 160, 175, 183, 187, 193, 200, 245, 250, 309–316, 365, 397–398, 402, 403–407, 413–414, 455.

"Finding and Declaration of Policy

"Sec. 2 (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) *causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States;* (2) burdens commerce and the free flow of goods in commerce; (3) *constitutes an unfair method of competition in commerce;* (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) *interferes with the orderly and fair marketing of goods in commerce.*

"(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."[10]

So far as the distribution of goods is concerned, therefore, it is the declared purpose of the Act to regulate the movement of goods which compete unfairly with other goods, because of the conditions under which they were produced. The definition of the term "goods" (Sec. 3 (i)), with its exclusion of goods in the hands of ultimate consumers, is a further demonstration of this purpose.

This Court has recognized that the intention of Congress was to regulate the production and movement of goods which compete with other goods in a commercial sense. In *United States* v. *Darby*, 312 U. S. 100, the Court, speaking through Mr. Justice Stone, said (p. 115):

"The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made

[10]Italics supplied throughout this brief unless otherwise indicated.

> the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows."

and again (p. 122):

> "* * * As we have said the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; * * * The Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as 'unfair,' as the Clayton Act has condemned other 'unfair methods of competition' made effective through interstate commerce.* * *"

Not only does the background and history of the Fair Labor Standards Act demonstrate that Congress intended to apply the Act to an area which does not include the situation involved here, but any attempt to apply the Act to the instant case leads to results which Congress clearly cannot have intended. For example, if, as Petitioners contend, Respondent is their employer and is liable to them under the Fair Labor Standards Act, the Government will ultimately pay the bill which will include liquidated damages and attorneys' fees. The cost-plus-a-fixed-fee contract produces this result. Although authorization for cost-plus operations indicates a willingness to bear the cost of overtime, it seems inconceivable that Congress could have intended that the Government pay liquidated damages and attorneys' fees, in view of the express provisions of the earlier enacted Public Contracts Act, under which the Secretary of Labor acts for the underpaid employees of a Government contractor and neither unpaid overtime compensation nor liquidated damages nor attorneys' fees are added to the Government's bill.

It is no less difficult to believe that Congress intended the "hot goods" section of the Act (Section 15 (a) (1)) to apply to

shipments of ammunition which had not been produced in accordance with the standards of the Act.

The inapplicability of the Fair Labor Standards Act to Respondent's employees does not mean that they were without protection against substandard labor conditions. The Act of July 2, 1940,[11] which authorized the Secretary of War to enter into the cost-plus-a-fixed-fee contract with Respondent (R. 22) contains an express reference to the Walsh-Healey Act. This Act, compliance with which was a specific condition of the contract between the Government and Respondent (R. 47–50), contains broad protective provisions, which in important respects are more favorable to employees than the minimum standards required by the Fair Labor Standards Act.[12]

Petitioners argue (Br., pp. 28–29) that during the war bills introduced in Congress to suspend the Fair Labor Standards Act were rejected and that this non-action plus the legislative history of the Portal-to-Portal Act suggest that Congress believed the Fair Labor Standards Act applicable to employees of cost-plus-a-fixed fee contractors. It was made clear, however, during the course of the debates on the Portal-to-Portal Act that there were serious doubts whether Fair Labor Standards

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[11]Public No. 703, 76th Cong., 3rd Sess., c. 508, 54 Stat. 712.

[12]Under the Walsh-Healey Act and the regulations issued pursuant thereto an employee is entitled to overtime for hours worked in excess of eight per day, whereas under the Fair Labor Standards Act he would not be entitled to overtime until he had worked forty hours during a week. In addition, the Walsh-Healey Act provides that an underpaid employee may call upon the Secretary of Labor for assistance, whereas under the Fair Labor Standards Act he must employ an attorney and bring suit himself. The Walsh-Healey Act is mentioned here not for the purpose of suggesting that this Act and the Fair Labor Standards Act may not under some circumstances apply to the same employees, but to show that Respondent's employees had the protection of a federal statute and of the power of Congress to improve upon that statute even though they are not covered by the Fair Labor Standards Act.

Act suits could be maintained against cost-plus-a-fixed-fee contractors.[13]

It is submitted that the background and legislative history of the Act, its declared purposes and penalties, and the obvious incongruities which would otherwise exist demonstrate beyond question that Congress did not intend the Act to apply to the type of situation involved here.

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[13]During the course of the debates on H.R. 2157, which became the Portal-to-Portal Act, Senator Donnell, one of the authors of the Act, made the following statement on the floor of the Senate (Vol. 93, Cong. Rec. No. 54, 80th Cong., p. 2442): "Mr. President, those two acts should be included. In the first place, it is true, of course, that few suits, if any, have been filed hitherto under the Bacon-Davis Act or the Walsh-Healey Act. The reason is clear. It is that under those acts all a man can recover is the amount of wages to which he is entitled. Under those acts no one is entitled to recover liquidated damages equal to the amount of wages to which he was entitled. However, Mr. President, two facts should be noted. In the first place, great difficulties may develop for employers in the future under the Fair Labor Standards Act, because in the case of war contracts, there is great doubt whether suits, even though nominal, against employers are in fact against the Government, and obviously under the Fair Labor Standards Act a suit cannot, by the express provisions of that act, be maintained against the Government.

"Furthermore, it may well be held that suits may not be filed and successfully maintained by employees who were working on war contracts, because interstate commerce might not be involved in such suits. There is now in existence a subcommittee of this body which has been looking into the fact that at one time the Attorney General directed that these two defenses—namely, the absence of the interstate commerce element and the fact that the Government is the real party in interest—be made."

The U. S. Attorney represented the contractor-employer in *Anderson* v. *Federal Cartridge Corp*, 13 C.C.H. Labor Cases ¶64,072 (U.S.D.C., D. Minn., 1947), not officially reported, in which the defense that the Fair Labor Standards did not apply to a situation like that here was sustained. The U. S. Attorney approved similar defenses urged by the contractor-employer in *Divins* v. *Hazeltine Electronics Corporation*, 70 F. Supp. 686 (S.D.N.Y., 1946), modified in 163 F.(2) 100 (C.C.A. 2, 1947), see Brief of Defendants-Appellees in the Circuit Court of Appeals, p. 3. It should be noted, too, that an army officer, Bert E. Church, urged the same defense successfully in *Umthun* v. *Day & Zimmerman, Inc.*, 7 C.C.H. Labor Cases ¶61,977 (D. Ct., Des Moines Co., Ia., 1944), not officially reported, reversed, 235 Iowa 293 (1944), as well as in *Trefs* v. *Foley Bros. Inc.*, 7 C.C.H. Labor Cases ¶61,743 (U.S.D.C., W. D. Mo., 1943), not officially reported.

Points II, III, and IV of this brief demonstrate with greater particularity that petitioners were not engaged in the production of goods for commerce, either within the general legislative intent or within the meaning of the provisions which they invoked below.

POINT II

PETITIONERS WERE NOT ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE BECAUSE THE AMMUNITION PRODUCED DID NOT CONSTITUTE GOODS WITHIN THE FAIR LABOR STANDARD ACT'S GENERAL DEFINITION OF THE TERM.

The definition of "goods" in the Fair Labor Standards Act itself evidences that the "goods" with which the Act is concerned are solely items of trade or commerce in the general sense. That definition, without the exclusion which is considered in Point III, *infra*, is as follows:

"Sec. 3. As used in this Act—

> "(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, * * *"

The language "wares, products, commodities, or articles or subjects of commerce" evidences the intent of Congress to limit the definition to articles or subjects of trade in the commercial sense. This conclusion is supported by the parenthetical specification of "ships," items which ordinarily would not fall within this category.

The same concept appears in other parts of the Act. Section 2, for example, containing the Congressional declaration of policy, refers to "industries engaged * * * in the production of goods," to the "free flow of goods," to "competition," and to "the orderly and fair marketing of goods."

The various types of ammunition assembled and loaded at the Louisiana Ordnance Plant are the exact opposite of the goods or articles of commerce to which the Act was intended to apply. The ammunition was produced solely for use by the Government in the prosecution of the war. It was produced at a plant which was owned by the Government from parts which were owned and supplied by the Government. It was not marketed; it did not enter competition with other goods; and it was in no sense an ordinary commercial article or an ingredient thereof.

In *Divins* v. *Hazeltine Electronics Corporation*, 163 F. (2d) 100 (C. C. A. 2, 1947), the Circuit Court of Appeals for the Second Circuit squarely held that battleships, cruisers and destroyers, were not "goods" within Section 3 (i) of the Act, despite the express mention of "ships" in the definition. The court said (p. 102):

> "* * * But most of the vessels on the repair or servicing of whose equipment the plaintiffs did their work were war vessels operated by the United States or by allied nations in the prosecution of the war. In any realistic use of words such vessels would seem to be instrumentalities of war, not of commerce. It is true that warships transport men, munitions, food for crew and troops, and occasionally, perhaps, supplies for civilians; and they may at times transmit radio messages for civilians. See *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 9 Cir., 156 F. (2d) 334, 335. This literally satisfies the statutory definition of commerce, but such transportation or communication is merely incidental to the war purpose for which the vessel is actually being used. To hold that workmen who repair aircraft carriers, battleships, submarines or other types of vessels used as weapons of war are 'engaged in commerce,' stretches the quoted words, elastic though they may be, beyond all reasonable limits. * * *
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> * * *
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> "* * * The same considerations which support the view that the appellants were not engaged in commerce in re-

> pairing equipment on war vessels lead to the conclusion that 'ships' was not intended to embrace vessels of this type. * * *"

Similarly, in *Young* v. *Kellex Corporation*, 14 C. C. H. Labor Cases ¶64,244 (U.S.D.C., E.D. Tenn., 1948), not officially reported, the court held that atomic bombs were not "goods" under the Act. After an exhaustive review of the history of the commerce clause, the court held that an atomic bomb, although a product of manufacture moving across state lines and looking like a commercial article was not "an article of commerce" within the meaning of the Fair Labor Standards Act. The court said (p. 72,537):

> "It is not enough that goods exist as a result of productive processes. They must be goods of commerce, or wares of commerce, or merchandise of commerce, after they have been produced. * * *"

The same rationale was applied by the court in *Kruger* v. *Los Angeles Shipbuilding and Dry Dock Co.*, 12 C. C. H. Labor Cases ¶63,660 (U.S.D.C., S.D. Calif., 1947), not officially reported. In holding that the Act did not apply to employees engaged solely in repair of Navy vessels, the court stated (p. 70,736):

> "* * * There was no commercial feature involved in its operations at the plant, as its activities were confined exclusively to the manufacture and repairing of vessels for the United States Navy, * * *"

See also *St. Johns River Shipbuilding Co.* v. *Adams*, 164 F. (2d) 1012 (C. C. A. 5, 1947).

The reasoning of these cases applies with equal force to the situation here present. The ammunition assembled at the Louisiana Ordnance Plant may have resembled, but it obviously was not a commercial article. Petitioners were therefore not engaged in the production of "goods" for commerce, and the decision of the court below should be affirmed.

POINT III

PETITIONERS WERE NOT ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE BECAUSE THE AMMUNITION PRODUCED FALLS WITHIN THE EXCLUSORY CLAUSE IN THE STATUTORY DEFINITION OF GOODS.

Even if it be assumed *arguendo* that the ammunition constituted "goods" within the general definition of the term set forth in Section 3 (i) of the Act, it is nevertheless excluded from the category of "goods" by the exclusory clause contained in the second portion of the definition. Section 3 (i) in its entirety reads as follows:

> "Sec. 3. As used in this Act—
>
> > "(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, *but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.*"[14]

As will be seen, the exclusory clause in Section 3 (i) defeats Petitioners' claims whether it be applied to the finished ammunition or to the component parts of the ammunition.

The courts below viewed the case as one in which the finished ammunition was delivered into the actual physical possession of the Government, the ultimate consumer thereof, at the plant site prior to its shipment out of the state, so that the exclusory

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[14]It is apparent that the phrase "other than a producer, manufacturer or processor thereof" refers to an ultimate consumer who consumes goods in the production of other "goods." An ultimate consumer is one who consumes or uses up. He cannot simultaneously be the consumer and the producer of the same goods.

clause became applicable at this point (R. 232, 239 and 154 F. (2nd) 1016, 1018). We take up this ground first and then the alternative proposition that the goods, *i.e.*, the component parts of the ammunition, were delivered into the actual physical possession of the Government, the ultimate consumer thereof, at or prior to the time they first arrived at the plant site, so that the exclusory clause became applicable at that point. This second ground was not reached by the courts below in view of their dismissal of the complaint on the first ground.

Petitioners concede that the finished ammunition was delivered into the actual physical possession of the Government at the plant site prior to its shipment out of the state. (Br. p. 9) It is also clear that the Government was the ultimate consumer of the finished ammunition. The utilization of ammunition in the prosecution of a war is the quintessence of consumption.[15] And, it is equally clear that the Government was not a producer, manufacturer or processor of the finished ammunition. The Government did no more than ship and consume the ammunition.

Upon these facts, about which there is no real disagreement, it is apparent that the finished ammunition had lost its character as "goods" before it was shipped from the plant by the Government. This being the case, "goods" did not move in commerce and there cannot have been a "production of goods for commerce" within the meaning of the overtime provision of the Act (Sec. 7) invoked by Petitioners.

The court below, adopting the view of several other federal

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[15]Petitioners suggest (Br. pp. 39–40) that Allies may have used some of the munitions under the Lend-Lease Act. There is no basis for such an inference in the record. Furthermore, such use would not affect the application of the exclusory clause. *Divins* v. *Hazeltine Electronics Corporation*, *supra*.

courts, dismissed the complaint upon this ground. The court said (164 F. (2d) 1016, 1018):

> "On the other hand, if the defendant was not an agency or instrumentality of the United States, and if the munitions were articles of commerce within the contemplation of the Act, and if the United States was not the producer of the munitions, and if the subparagraph (d) of Sec. 3 of the Act, excluding the United States from its operation, is not applicable, then there would seem to be no escape from the conclusion that since the finished products and all their ingredients are the property of the United States and delivered to it as the ultimate consumer of the goods, the Act, under subparagraph (i) of Sec. 3, would still be inapplicable because the term 'goods' 'does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof, other than a producer, manufacturer, or processor thereof.' Since the Government is the ultimate consumer, and since the goods were delivered into its actual physical possession as ultimate consumer, any movement of the goods thereafter by the ultimate consumer over state lines would not relate back and take the goods out of the exception of subparagraph (i) of Sec. 3 of the Act. *Divins* v. *Hazeltine Electronics Corp.*, 2 Cir., 163 F. 2d 100."

In the *Divins* case[16] relied upon by the court below, the Circuit Court of Appeals for the Second Circuit held that radar equipment being installed on warships had ceased to be "goods within the meaning of Section 3 (i) of the Act because the equipment was in the actual physical possession of the ultimate consumer, the United States Navy, which was not a producer, manufacturer, or processor of the equipment.[17]

In *Barksdale* v. *Ford, Bacon & Davis, Inc.*, 70 F. Supp. 690 (E.D. Ark., 1947), involving circumstances virtually identical with those here, it was also held that finished ammunition deliv-

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[16] *Divins* v. *Hazeltine Electronics Corp.*, *supra*.

[17] See *infra* p. 24 for further discussion of the *Divins* case, and particularly its holding with respect to the installation of radar equipment on cargo ships.

ered to the Government at the plant site had ceased to be "goods" and that there had consequently been no production of goods for commerce. The court said (p. 694):

> "* * * After these goods were worked on by the plaintiff, the United States shipped the same under Government bill of lading to military facilities outside of the state. If it can be said that the goods were in the constructive rather than actual possession of the Government while they were being processed, they were certainly in the actual physical possession of the Government when they were shipped. The goods in question were munitions of war and were manufactured for the purpose of being consumed by the United States in the prosecution of the war. Hence the United States in our opinion was the ultimate consumer thereof within the meaning of the Act, and the plaintiff was not engaged in the 'production of "goods" for commerce.'"

In *Anderson* v. *Federal Cartridge Corp.*, 13 C. C. H. Labor Cases ¶ 64,072 (U. S. D. C., D. Minn., 1947), not officially reported, the court held (p. 72,011):

> "* * * all of the ammunition produced at the defendant's plant, * * * was placed in the actual physical possession of the Government and * * * the Government was the ultimate consumer thereof. When such finished products were accepted by the Government, they were completely and permanently removed from the channels of commerce. They were then in the hands of the 'ultimate consumer'—namely, the Government, which is not shown to be either a 'producer, manufacturer, or processor thereof' within the meaning of the Act. * * * The manufactured products here were to be ultimately consumed solely by the Government in the prosecution of the war and accordingly come clearly within the meaning of the Act. * * *"

These decisions are directly applicable here. The finished ammunition had been permanently removed from the channels of commerce by its delivery at the plant site into the actual physical possession of the Government, the ultimate consumer. At that point it ceased to be "goods." Its subsequent shipment

did not constitute a shipment of "goods" in commerce and its production was not a "production of goods for commerce." Application of the Act to the production here may not, therefore, be predicated upon the movement of the finished ammunition after its delivery to the Government at the plant site.

The same result follows, and the decision below should also be affirmed, if the case is considered on the basis of the second ground referred to above, namely, that the goods, *i.e.*, the component parts of the ammunition, were in the actual physical possession of the Government at least from the time they were first delivered to the plant. Although the Courts below did not reach this question in view of their decision on the first ground, it is nonetheless clear that the exclusory clause of Section 3 (i) defeats Petitioners' claims when applied to the component parts of the ammunition.

The Government itself furnished all component parts for the loading and assembling of the ammunition and appears to have had them in its possession even before they were brought to the plant. The plant was a military reservation subject to Army regulations and under the exclusive jurisdiction of the United States. The Government owned and possessed the land and the buildings in which the assembly and loading operations were carried on, as well as all materials and equipment in and around the buildings. The Government exercised a strict and far-reaching military and physical control of all property through its commanding officer and his military and civilian staff. Petitioners came upon the premises and worked upon the component parts but at no time were they or Respondent in possession of the parts in the sense that they had a right to deal with them as their own or to do anything with respect to them which they were not instructed or permitted to do by the Government.

Under these circumstances, the presence of Petitioners and Respondent no more disturbed or interfered with the Govern-

ment's physical possession of the component parts of the ammunition than the presence of a contractor and his employee-mechanics would disturb the Government's physical possession of its own automobiles, if the latter engaged the former to come to a Government establishment and repair the cars. In a very real sense the Government had actual physical possession of all parts and materials at the Louisiana Ordnance Plant during the period Petitioners claim to have worked there.

Obviously the Government was the ultimate consumer of the component parts which, when assembled, became the finished ammunition; certainly, no one else consumed them.

Consequently, on this second ground, the exclusory clause is applicable unless the Government was the "producer, manufacturer or processor" within the meaning of the exception to the exclusory clause. Even Petitioners do not contend this, for the essence of their case is that Respondent and not the Government was the producer. If the Government were the producer, there is no escape from the alternative holding below that it was also the employer of Petitioners, in which case Petitioners fail because the Government is excluded from the definition of "employer" in Section 3 (d) of the Act.

Furthermore, even if it be assumed *arguendo* that the Government was a producer in the sense that it caused the production to occur, this would not affect the applicability of the exclusory clause under the circumstances of this case.

As has been seen,[18] the exception to the exclusory clause applies only to an ultimate consumer who consumes goods in the production of other "goods," since by general understanding and dictionary definition, an ultimate consumer of goods cannot simultaneously be a producer of the same goods. The exception was added, of course, because such a consumer in the very process of consumption, produces other goods which he

[18]Footnote 14, *supra*.

does not consume and which enter the stream of commerce. Goods in the hands of an ultimate consumer, therefore, are excluded from the Act's coverage by the exclusory clause unless they are used (and thus consumed) in the production, manufacture or processing of other "goods." This interpretation accords with the framework of the Act and the purpose of Congress to limit its application to commercial activities, and has the support of *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, where this court stated (p. 678):

> "Although in this case the motors sold by the petitioner were not purchased by its customers for resale or to be processed for resale, and although they were to be used and probably ultimately to be 'consumed' in the hands of the petitioner's customers, these motors remained actively in use in the production of the 'flow of goods in commerce.' It is to this great field of the production of goods for interstate commerce that the Act is directed.
>
> "The record establishes the 'commercial and industrial' character of the petitioner's customers. * * * The Fair Labor Standards Act is concerned with goods in the stream of commerce but not with those in 'the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.' See § 3 (i), *supra*."

The controlling distinction between the *Roland Electrical Co.* case and this case is this: in that case the consumers of the motors produced other goods which they did not consume, whereas in this case, the consumer of the component parts, *i.e.*, the Government, produced other goods, *i.e.*, the finished ammunition, which it did consume. There was in this case no end product which escaped into the channels of commerce. It is apparent therefore that even if the Government is regarded as the producer, it is still an ultimate consumer within the meaning of the exclusory clause.[19]

[19] If an ultimate consumer consumes Article A in the production of Article B, but also consumes Article B and in so doing produces no other articles, Article B is not "goods" under the statutory definition because it is consumed and not used in the production of other "goods." And since Article A was not used to produce "goods," Article A itself has ceased to be "goods." Hence employees who work on Article A which is used to make Article B are not working upon "goods."

Thus in *Divins* v. *Hazeltine Electronics Corporation*, *supra*, the Circuit Court of Appeals for the Second Circuit held that employees installing radar equipment on warships were not covered by the Act, because the goods, i.e., the equipment, did not constitute "goods" within the meaning of the Act. The Government was in possession of it. The Government was the ultimate consumer of it. And the Government was not the "producer, manufacturer or processor" of the equipment, even though it caused the work to be done on it, because the equipment was not being used to produce other "goods." The court reached the opposite result with respect to the installation of radar equipment on the cargo ships, on the ground that such ships were instruments of commerce. The cargo ships, like the motors in the *Roland* case, would remain actively in use in the "flow of goods in commerce."

The situation here is identical with that of the warships in the *Divins* case. The component parts of the ammunition like the radar equipment were in the hands of the ultimate consumer, and the parts here and the radar equipment there were used to make further articles, in this case finished ammunition and in that case warships. But both the finished ammunition and the warships were to be wholly consumed by the Government and were not to be used to make other "goods" or put other "goods" in the flow of commerce. The Government here was no more a "producer, manufacturer or processor" within the exception to the exclusory clause than it was in the *Divins* case.

Similarly, in *Lynch* v. *Embry-Riddle Co.*, 63 F. Supp. 992 (S.D. Fla., 1945), it was held that employees of a contractor whom the Government procured to repair component parts of Army airplanes, taken from planes previously in the possession of the Army and subsequently to be returned to the Army in other states, were not covered by the Act. They were working upon goods after their delivery into the actual physical possession of the ultimate consumer other than a producer. The court

emphasized that the exclusory clause was an intentional limitation upon the coverage of the Act, stating (p. 996):

> "* * * *One of the areas carved out or exempted from the operation of the power which Congress might have exercised but did not, is that of work upon goods after such goods have come into the hands of the ultimate consumer.* In this case it is quite clear that the planes and component parts thereof upon which the defendant worked were in the hands of the ultimate consumer, to wit, the Federal Government, while engaged in the prosecution of the War. The Government in using these planes, both before and after the overhaul operations thereof, conducted by the defendant, was the ultimate consumer thereof, and the Government in using the planes in the prosecution of the War for the training of pilots was not a producer, manufacturer or processor thereof."

See also *Kruger* v. *Los Angeles Shipbuilding and Dry Dock Co.* (S.D. Calif.), *supra.*

Consequently, the exclusory clause became applicable here for the additional reason that the Government possessed the component parts of the ammunition throughout the period in question. Admittedly, this result follows only in exceptional circumstances such as those involved here. Except in this extraordinary situation, an ultimate consumer who causes work to be done upon goods in his possession will not be an "ultimate consumer" within the exclusory clause because it will be found that he is consuming goods in the production of other "goods" or in causing other "goods" to flow in commerce. This is true of the hypothetical cases suggested by Petitioners (Br. p. 39).

Petitioners' main argument on the exclusory clause (Br. p. 38) is that it was intended solely to protect ultimate consumers from the "hot goods" section of the Act (Sec. 15 (a) (1)). This is tantamount to saying that the word "goods" has one meaning when used in Section 15 (a) (1) of the Act and a different meaning when used in other sections of the Act, in direct contradiction of Section 3 itself which provides that the definition shall

apply wherever the term is used in the Act. The same argument was disposed of by the Circuit Court of Appeals for the Second Circuit in the *Divins* case. The court said (163 F. (2d) 100, at p. 104):

> "* * * The plaintiffs protest that the purpose of the exclusory clause was to protect from the penalties of §215(a)(1) persons who might innocently deal with goods that had been produced in violation of the Act, and that the clause should receive no broader interpretation. Several cases have intimated that this was the primary purpose of the clause. Chapman v. Home Ice Co., 6 Cir., 136 F 2d 353, 355, certiorari denied 320 U. S. 761, 64 S. Ct. 72, 88 L. Ed. 454; Hamlet Ice Co. v. Fleming, 4 Cir., 127 F 2d 165, 171, certiorari denied 317 U. S. 634, 63 S. Ct. 29, 87 L. Ed. 511; Gordon v. Paducah Ice Mfg. Co., D. C. W. D. Ky., 41 F. Supp. 980, 986. *But we find nothing in these cases or in the legislative history to indicate that this was the sole purpose or that the statutory definition of 'goods' is not to be given effect in determining the coverage of the Act.* * * *"*[20]

The legislative history of the Act suggests the contrary of Petitioners' contention. The Assistant Attorney General appearing for the Government at the hearings upon the original bills appears to have believed that the Act was not to be applied to the production of goods which were to be transported across state lines by their ultimate consumers. At a time when the bills contained an ultimate consumer exclusion but no retail or service establishment exemption, he stated that small business enterprises located near state lines would not be covered unless they actually delivered goods across state lines.[21] The inference is plain that such businesses were not to be covered if it was the ultimate consumers who carried the goods across

[20] It is significant that the cases cited in the quotation from the *Divins* case are the principal authorities upon which the Wage Hour Administrator relied in urging the court below to hold the exclusory clause inapplicable. The claimed ultimate consumers in those cases were not ultimate consumers within the exclusory clause, since the goods (ice) which they consumed were used to promote the flow of other goods in commerce.

[21] Joint Hearings, 75th Cong., 1st Sess. on S-2475 and H.R. 7200, p. 35.

state lines. If Congress had intended to limit the application of the exclusory clause as Petitioners contend, it would have said so expressly and not made it applicable throughout the Act.

It is submitted that the exclusory clause contained in Section 3 (i) of the Act is applicable here whether the Government had physical possession of the component parts of the ammunition throughout the period in question or received physical possession only upon delivery to it of the finished ammunition at the plant site. The decision below should be affirmed.

POINT IV

EVEN IF PETITIONERS WERE PRODUCING "GOODS," THEY DID NOT PRODUCE GOODS FOR COMMERCE BECAUSE THE ARTICLES PRODUCED DID NOT ENTER COMMERCE WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT OR THE COMMERCE CLAUSE OF THE CONSTITUTION.

Congress enacted the Fair Labor Standards Act in the exercise of the regulatory power given it in the commerce clause. Section 2 (b) of the Act says:

> "It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, * * *"

The power thus exercised was given to Congress in Article I, Section 8 of the Constitution which declares that "the Congress shall have power * * * to regulate commerce * * * among the several states * * *".

The Act applies to persons engaged in commerce and in the production of goods for commerce. The question here is whether there was production *for commerce*. The production itself was local and beyond the reach of the commerce power unless it in some way affected commerce. If the production was not followed by the kind of interstate activity which Congress may regulate under the commerce power, the production which pre-

ceded and affected such interstate activity may not be regulated under the commerce power, and the Act does not apply to it.

This is precisely the situation which is involved in the instant case. Petitioners were producing ammunition for shipment by the Government. And the Government in causing the production to occur, and in owning and controlling the project every step of the way, and in taking the finished ammunition and shipping it abroad was exercising its power to wage war, which is the very antithesis of engaging in commerce. Therefore those who worked upon the ammunition were not engaged in the production of goods for commerce, and hence not covered by the Act.

The Court below adopted this view. It said (164 F. (2d) 1016, 1017):

> "We are of opinion that transportation by the Government of Government owned munitions during war for use by its armed forces is not 'commerce' within the meaning of the Fair Labor Standards Act. * * * "
>
> * * *
>
> " * * * Our case of Atlantic Co. v. Walling, 5 Cir. 131 F. (2d) 518, 521, holds that the Congress in defining 'commerce' intended to give to the term the broadest possible meaning, so as 'to include such transactions, conditions and relationships as have been heretofore known and acknowledged as constituting commerce in the Constitutional sense.' It nowhere holds, or tends to hold, that the transportation during war of Government owned munitions is 'commerce' under the Fair Labor Standards Act."

And, in his concurring opinion below Judge Sibley said (p. 1019):

> " * * * If the Constitution had vested the war power in the federal government, and left the regulation of Commerce to the States, so that an Act like the Fair Labor

Standards Act had been enacted by the States, no one would contend that the war power was circumscribed by the States' commercial legislation. That is because war is not commerce. This case deals with war and not commerce."

In *St. Johns River Shipbuilding Co.* v. *Adams*, 164 F. (2d) 1012 (C.C.A. 5, 1947), decided the same day as the instant case, the Court held that the production of Navy tankers was not a production for commerce and said (p. 1015):

"* * * They were goods produced for war, not for commerce. War is not commerce. There can be commerce in war equipment, but when the government itself in the midst of war has produced for immediate use in war at its own expense and in its own shipyard special type vessels as auxiliaries for its navy and to be manned by navy crews, commerce is not involved at all. The Company and its employees knew it was not. The war power of the federal government is its supreme power. When it is in action it is transcendent. * * *"

As has been seen, the Circuit Court of Appeals for the Second Circuit took a similar view in *Divins* v. *Hazeltine Electronics Corporation*, *supra*. Cf. *National Labor Relations Board* v. *Reynolds Corporation*, 155 F. (2d) 679 (C.C.A. 5, 1946).

In *H. B. Deal & Co. Inc.* v. *Leonard*, 210 Ark. 512, 196 S. W. 2d 991 (1946), employees of a company erecting a Government-owned plant for the manufacture of war materials claimed to be engaged in the production of goods for commerce. In holding that the employees were not so engaged, the Court stated (pp. 518, 522):

"This argument is based on the fact that the plant was to be used in the manufacture and shipment of ammonium in commerce when completed, which is, in our judgment, a false assumption, since the Government would use the product of the plant for the manufacture of munitions to be used in the prosecution of the war in which we were then engaged, and, while it would cross state lines, the

Government is the sum of all the states and of itself knows no state lines in the manufacture and shipment of war material.

* * *

"We, therefore, hold that appellees were not engaged in commerce or in the production of goods for commerce within the purview of the Fair Labor Standards Act, and that said Act has no application to the Goverament of the United States in its activities in the prosecution of a war."

See also *Anderson* v. *Federal Cartridge Corp.* (D. Minn. 1947) *supra; Kruger* v. *Los Angeles Shipbuilding and Dry Dock Co.* (S.D. Calif. 1947) *supra; Stewart* v. *Kaiser Co.*, 71 Fed. Supp. 551 (Ore., 1947); *Hayes* v. *Hercules Powder Co.*, 13 C.C.H. Labor Cases 64,123 (W.D. Mo. 1947), not officially reported; *Krill* v. *Arma Corporation*, 14 C.C.H. Labor Cases Par. 64,382 (U. S. D. C., E.D. N.Y., 1948), not officially reported.

Other decisions to the same effect emphasize that production of Government-owned articles for shipment by the Government is not production for commerce because shipment by the Government of its own property is not commerce but an administrative act of the sovereign. These holdings are in accord with the decision in *National Labor Relations Board* v. *Idaho-Maryland Mines Corp.*, 98 F. (2d) 129 (C.C.A. 9, 1938), where the court stated (p. 131):

"Nor is the Board's assumption of jurisdiction warranted by the fact that the United States, after purchasing respondent's product and commingling it with other gold and silver, ships the commingled product from its San Francisco mint to its Denver mint for safe keeping. Respondent does not make these shipments or cause them to be made. *We regard such shipments, not as commercial transactions, but as administrative acts of Government.*"[22]

[22] See also *National Labor Relations Board* v. *Sunshine Mining Co.* 110 F. (2d) 780, 784 (C. C. A. 9, 1940); *Fox* v. *Summit King Mines, Limited*, 143 F. (2d) 926, 928 (C. C. A. 9, 1944).

In *Barksdale* v. *Ford, Bacon & Davis, Inc.* (E.D. Ark., 1947), *supra*, employees engaged in producing munitions for the Government under circumstances precisely the same as those involved here, were held not engaged in the production of goods for commerce. After a thorough analysis of the background of the commerce clause and cases on the subject, the Court said (p. 700):

> "* * * There have been no cases cited to us, and we have found none, which were decided prior to the enactment of the Fair Labor Standards Act, and which tended in any sense to hold that a shipment by the United States in its sovereign capacity of its own property across state lines, constitutes commerce.
>
> "With due respect to the courts holding to the contrary, we cannot agree that the shipment involved here is anything other than an administrative act of the Government."

In *Matlock* v. *Sanderson & Porter*, 7 C.C.H. Labor Cases, ¶61,806 (Cir. Ct., Jeff. Co., Ark., 1943), not officially reported, also involving circumstances very similar to those involved here, the court denied recovery and said, (p. 65,305):

> "* * * In addition, this Court is of the opinion that the manufacture of munitions of war by the Government and the transportation thereof by the Government to points where needed, either in the United States or abroad, is not commerce as defined by the Fair Labor Standards Act, but is an administrative act by the Sovereign."

See also *Raymond* v. *Parrish*, 71 Ga. App. 293, 30 S.E. 2d 669 (1944); *Trefs* v. *Foley Bros. Inc.*, 7 C.C.H. Labor Cases ¶61,743 (U.S.D.C., W.D. Mo., 1943), not officially reported.

The validity of these decisions is apparent from the nature of and the relation between the commerce and war powers of the Federal Government.

The power to regulate commerce belonged to the States themselves before the adoption of the Constitution. *South*

Carolina v. *Georgia*, 93 U. S. 4, 10. The people of the states granted it to the newly created Federal Government. The commerce that Congress was thus empowered to regulate was that among the people of the states or the states themselves, not the sovereign activities of the newly created Federal Government. In other words, it is not a power given by the people to the Federal Government to regulate itself.[23]

Thus on numerous occasions this Court has indicated that commerce in the Constitutional sense consists of activities carried on by and among the people of the states.

In *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, at p. 203, Mr. Justice Field says:

> "Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities."

In *Addyston Pipe and Steel Company* v. *United States*, 175 U. S. 211, at p. 241, Mr. Justice Peckham says:

> "As has frequently been said, interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, * * *"

In *Carter* v. *Carter Coal Co.*, 298 U. S. 238, at p. 298, Mr. Justice Sutherland says:

> "As used in the Constitution, the word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of trade', and includes transportation, purchase, sale, and exchange of commodities between the citizens of the different States. * * *"

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[23]It is recognized that in exercising the commerce power, the Government may itself take substantive action, i.e., build a dam or a dock, but the purpose must nonetheless be to regulate commerce among the states.

The war power, on the other hand, is one of the inherent powers of the Federal Government. *United States* v. *Curtiss-Wright*, 299 U. S. 304. As was said by the court in *St. Johns River Shipbuilding Co.* v. *Adams*, *supra*, (at p. 1015), "The war power of the federal government is its supreme power. When it is in action it is transcendent." When this power is exercised, the activities which are subject to the commerce power are curtailed and may even be stopped entirely. For example, the commerce between citizens of the United States and citizens of the enemy state is terminated almost automatically. When the Government enters into contracts for the operation of its own munitions plants and itself receives and accepts the munitions at the plants and ships them from one state to another or to a foreign country, it is acting under its war power, and that power alone. It is not engaging in commerce and its activity is not subject to regulation under the commerce power. Cf. *Du Pont* v. *Davis, Director General*, 264 U. S. 456, in which the Court held a section of the Transportation Act of 1920 inapplicable to the Government's war time operation of the railroads, stating (at p. 462):

> "In taking over and operating the railroad systems of the country the United States did so in its sovereign capacity, as a war measure, 'under a right in the nature of eminent domain,' * * * and it may not be held to have waived any sovereign right or privilege unless plainly so provided.* * *"

Both the war power and the commerce power may be used to regulate the activities of others. Congress may use them simultaneously. But the war power is more than a regulatory power. It is the power to use armed forces and to direct their operations. It is the power to equip and maintain such forces and to ship to them whatever may be necessary. It is inconceivable that the constitution was framed so as to result in a head-on collision between the war power and the commerce power. Yet, if Petitioners are correct and the Fair Labor Standards Act is applicable here, such a collision occurred every time the

Government shipped ammunition which was not produced in accordance with the standards of the Act.[24]

As was said by Judge Sibley below, 164 F. (2d) 1016, at p. 1019, if the power to regulate commerce had been retained by the states, no one would suggest that the Federal Government's war power would in any way be circumscribed by the states' regulation of commerce. The soundness of Judge Sibley's analysis finds strong support in the New York Court of Appeals' decision in *Public Service Commission* v. *New York Cent. R. Co.*, 230 N. Y. 149, 129 N. E. 455 (1920), where the court made clear that the State's power over commerce was suspended when the Federal Government exercised the war power.

The shipment by the Government of finished ammunition—although an exercise by the sovereign of its war power—could, admittedly, be subjected by Congress to such regulations as it thought proper. But this cannot help the Petitioners, for they are relying on a Commerce Clause statute, whereas any Congressional regulation of Governmental war activities must be, in itself, an exercise of the war power. Cf. *Krausz* v. *United States*, 14 F. Supp. 291 (Ct. of Cl., 1936), holding that property in the hands of the Alien Property Custodian was not subject to federal tax statutes except as Congress may give its consent in the exercise of the war power. No such enactment is found here. Had Congress intended these wartime shipments to be subject to the Fair Labor Standards Act, a statute already two years old at the time the war production problem arose, it would most certainly have taken action under the war power to provide the actual shippers of the ammunition with such protection from proceedings under the "hot goods" section of the Act (Sec. 15 (a) (1)) as would enable them to ship ammuni-

[24]Various defenses would, of course, be open to the individuals who shipped the ammunition, such as the claim that they were not "persons" or that the ammunition was not "goods." But the existence of such defenses is wholly accidental and does not resolve the basic conflict referred to here.

tion when and where it was needed, irrespective of whether overtime compensation had been paid during the production process.

Upon the basis of the foregoing analysis of the commerce and war powers of the Federal Government it is submitted that courts have been correct in holding that there was no production of goods for "commerce" at Government-owned war plants such as the one involved here. Since the Fair Labor Standards Act was clearly an exercise of the commerce power alone, its application to production for interstate shipment necessarily depends upon the interstate shipment constituting commerce in the constitutional sense. Where, as in this type of case, the interstate shipment is not commerce in the constitutional sense but an activity of the Government itself carried on pursuant to the war power, the Act does not apply. The decision below that Petitioners were not producing goods for "commerce" should be affirmed.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decision of the Court below should be affirmed.

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APPENDIX

12-1-43 (11-1-43) Ordnance Procurement Instructions 50,001

Part 50—Administration of Cost-Plus-a-Fixed-Fee Contracts

Contents

Section A—GENERAL

50,000. Scope of this Part. This Part deals with general matters concerning the administration of cost-plus-a-fixed-fee contracts. Particular matters are dealt with in other parts of Ordnance Procurement Instructions, such as taxes, labor, insurance, fiscal procedure, auditing, property accountability, plant security, etc.

50,001. Definitions.

50,001.1. New Ordnance Facility.—The term "New Ordnance Facility" means a Government-owned, contractor-operated plant under the jurisdiction of the Ordnance Department. Where the term "New Ordnance Facility" appears in Ordnance Procurement Instructions, except where authority to make awards of contracts is concerned, it shall be deemed to include contractor-operated Field Service depots.

50,001.2. Contracting officer's representative.—As used in this Part 50, the term "contracting officer's representative" means the person designated by the contracting officer to exer-

cise primary authority with respect to administration of a particular contract.

* * *

50,002. Duties of Commanding Officers and Contracting Officer's Representative.

50,002.1. In the case of new Ordnance facilities and contractor-operated Field Service depots, the contracting officer's representative appointed by the contracting officer administering the operating contract will also be appointed the commanding officer of the station. Since the station is a Class IV installation under AR 170-10 as amended, he will be guided by the provisions of pertinent Army Regulations. In general, Army Regulations pertaining to the duties and responsibilities of a commanding officer do not apply in the full sense as the term is used in connection with regular posts, camps, or stations, in that such duties and responsibilities are affected by the terms of the contract entered into by the Government and the company operating the plant, works or depot. The Contracting Officer for each such new Ordnance facility or Field Service depot is in most cases the chief of the respective matériel branch of the Industrial Division, Office of the Chief of Ordnance or the Chief of the Storage Branch, Field Service Division. The job of Commanding Officer, although secondary to the more important job of contracting officer's representative, is necessary since the plant or depot and equipment are owned by the Government and require the supervision of a Commanding Officer as representative of the War Department in carrying out certain duties, among others:

a. Safety and defense of the station (including Military Intelligence and Sanitation).

b. Welfare, discipline, training, conduct, bearing, and appearance of military personnel.

c. Preservation, proper application and use of public property.

d. Enforcement of laws and regulations including the exercise of Court Martial Jurisdiction in accordance with the Articles of War.

e. Correction of irregularities and extravagance he may discover, or which may be reported by him.

f. Protection of the public interest in all matters relating to the administration of the contract and operation of the plant, works, or depot.

g. Preservation and promotion of harmonious relations with civilians.

h. Determination that Government personnel required to be bonded are bonded before entering on duty involving accountability.

i. Certification of Government pay rolls, vouchers, and purchase orders.

j. Assignment of military and civilian staff to specific duties and establishing their authority.

k. Accountability and responsibility for public property.

l. Necessary investigations and submissions of required reports to various divisions of the Ordnance Department, to the Service Commands and elsewhere.

m. Receiving and cooperating with all official visitors.

50,002.2 With respect to item k above, regarding property accountability and responsibility, a contracting officer's representative does not have responsibility in the sense of pecuniary liability for Government property in the possession of the contractor. Although failure on his part to carry out the duties imposed upon him as contracting officer's representative in connection with Government property in possession of the contractor will not subject him to financial liability for the property involved, he may, in appropriate cases, be subject to disciplinary action for dereliction of duty.

50,002.3 There are several types of contracts for the building and operation of Ordnance plants works and depots. They are, generally, of the cost-plus-a-fixed-fee type which specifically defines the obligations, responsibilities, rights and interests of the contractor, the Contracting Officer, and the contracting officer's representative. The term "contracting officer's representative", when used hereinafter in OPI 50,002. 4–50,002.12, inclusive, shall be construed to include the term "Commanding Officer."

50,002.4 The contracting officer's representative is appointed by the Contracting Officer to perform certain functions which in general are outlined in a particular contract. Certain duties and responsibilities, however, remain with the Contracting Officer. The primary interest of the contracting officer's representative is to be present and give his personal attention to the administrative problems which arise during operation of the contract so as to protect the interests of the Government under any and all circumstances. He must interpret the contract and directives pertaining thereto, and must maintain close liaison with the contractor. A contracting officer's representative is charged with the responsibility of performance, where applicable, or supervision of performance, in connection with the following functions in order to insure that the interest of the Government is being adequately protected: (a) protection of the plant or depot and of other Government property; (b) preservation and proper use of property, including maintenance of proper records; (c) production or operations at the plant, works, or depot, as the case may be; (d) industrial relations; (e) process inspection; (f) purchases; (g) accounting; (h) repair and maintenance; (i) plant improvements; (j) cooperation with City, County, State, and other Government officials, and representatives of other organizations on matters pertaining to the plant, works or depot; (k) management of Government staff, which includes inspectors, auditors, etc.; (l) findings of fact, certifications, and approvals pertaining to

the administration of the contract; (m) investigations and correction of any irregularities which he may discover or which are brought to his attention; (n) submission of required reports to various divisions of Ordnance Office; (o) safety and sanitation; and (p) performance of duties of Inspector of Ordnance (see OPI 50,003.).

50,002.5 With regard to the duty of protecting the Government plant, depot, and other Government property, it is to be observed that the relationship between the contracting officer's representative and the plant guards is an unusual one. Plant guards as Auxiliary Military Police are at all times under the command of the contracting officer's representative and subject to orders and regulations issued by military authority, and are also subject to military law and court martial jurisdiction in appropriate cases. They may not resign without the written approval of the contracting officer's representative. Nevertheless, their militarization does not change the basic attributes of the relationship between them and the contractor as their employer. Guards are permitted to organize and join labor organizations and to bargain collectively, but no activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police (see OPI 9,104.3A and OPI 57,004.3.).

* * *

PART 57—PLANT SECURITY

Contents

* * *

Section B—COST-PLUS-A-FIXED-FEE CONTRACTS

57,100. Plant protection in cost-plus-a-fixed-fee contracts.

57,100.1. Primary responsibility.—The protection of Government-owned plants operated by contract under the supervision of Chief of Ordnance is the primary responsibility of the contractor-operator and the commanding officer.

57,100.2. State and local governments.—State and local governments will enforce State laws and local ordnances and in general provide normal police, fire, health, and safety protection outside the boundaries of the military reservation. Although the primary responsibility for the enforcement of police regulations outside the military reservation boundaries rest with the State and local governments, the commanding officer or the contractor may assist the local government where this is necessary.

57,100.3. Commanding officer's responsibility.—Government-owned contractor-operated plants are military reservations. Commanding officers appointed by War Department orders are responsible for the safety of all personnel and Government property. The following is an extract from AR 210–10:

4. * * * b. He will be responsible for

(1) The safety and defense of the post. * * *

(4) The reservation, proper application, and use of public property.

(5) The strict enforcement of laws and regulations. * * *

(9) The guarding of the public interests in every particular.

It is, therefore, important that all commanding officers issue regulations that will insure the maximum protection to all personnel and to Government property in any event. These general regulations should be cooperatively issued by the contractor

and the commanding officer. The commercial safety experience is ordinarily with the contractor and the military responsibility is in the commanding officer. The enforcement of these rules is discussed in OPI 57,003.

57,100.4. Commanding officer's duties.—The responsibility of the commanding officer includes, but is not limited to, the following:

a. To see that the security and safety provisions of the contract and all regulations issued by the Office of the Chief of Ordnance or the War Department, or recommendations by the Safety and Security Branch or the Service Commanders, are fulfilled by the contractor. Ordinarily the commanding officer will not interfere with the administration of the safety and security plans of the contractor, unless a serious condition or emergency arises requiring the immediate intervention of the commanding officer for the protection of his primary responsibility to the Chief of Ordnance.

b. To report at once to the Chief of Ordnance all instances wherein the contractor fails to provide the necessary protection.

c. To prepare and keep up to date plans, in accordance with War Department directives, which will provide adequate security of the plant in case of insurrection, riot or other emergencies.

57,100.5 Commanding officer's staff.—It is recommended that during the operation of the plant the staff of the commanding officer include an Intelligence Officer, a Safety Officer, a Plant Protection Officer, and an Officer of the Day.

57,101. Operator-contractor's responsibility.—It is the responsibility of the operator-contractor to — —

a. Provide necessary equipment for the prevention of unauthorized entry to the plant.

b. Provide an adequate guard force to be administered in accordance with directives to be issued.

c. Provide adequate fire protection equipment under the direction of a Fire Chief employed by the contractor.

d. Provide, train and administer adequate fire protection organizations.

e. Provide safe and healthful working conditions for employees.

57,101.1 The War Department pamphlet entitled "Plant Protection for Manufacturers" was written "to provide manufacturers with a statement of what the War Department expects in the way of plant protection at all properties producing important, critical and essential supplies for war use."

The pamphlet is the authoritative reference for plant protection. Copies can be secured from the Washington Liaison Office, Safety and Security Branch, Office of the Chief of Ordnance. The contractor shall install and maintain in and about his plant additional equipment and personnel as required by the contracting officer. The contracting officer will implement the recommendations of the appropriate War Department personnel.

57,102. Protective features.—The adequate protection of a Government-owned privately operated plant ordinarily embraces the following:

a. Proper fencing around each manufacturing and explosive storage area.

b. Patrol roads located inside the fenced areas.

c. Patrol cars equipped with two-way radios and operating on patrol roads or mounted patrols, foot patrols, or dog patrols, or other effective means of patrolling the establishment.

d. Flood lighting systems located within fenced areas and illuminating grounds immediately surrounding all buildings.

e. Sentry boxes equipped with telephones and located at suitable intervals within the fenced areas.

f. Alarm systems particularly for fire and air raids.

g. Adequate fire fighting equipment.

SECTION C—JURISDICTION AND MILITARY RESERVATIONS

57,200. Jurisdiction.—Under this section are discussed problems arising out of the fact that certain Ordnance facilities are of such size as to create problems of safety and security which are of a governmental rather than commercial nature. The most important single factor in determining the responsibility of the Ordnance Department for safety and security problems of a police nature is the determination of jurisdiction.

57,200.1 Military reservations.—The term "Military Reservation" has no particular legal significance. It is a phrase used by the War Department to describe real estate devoted to War Department uses. No police powers or responsibilities arise merely because a particular place has been designated a Military Reservation.

57,200.2. Military areas.—Executive Order 9066, dated February 19, 1942, recites that "Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense materials, national defense premises, and national defense utilities," the President as Commander-in-Chief of the Army and Navy authorizes and directs "The Secretary of War and the military commanders whom he may from time to time designate, whenever he or any designated commander deems such action necessary or desirable, to prescribe military areas in such

places and of such extent as he or the appropriate military commander may determine, from which any or all persons may be excluded and with respect to which the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate military commander may impose in his discretion." The order also authorizes the Secretary of War and the military commanders "to provide for residents of any such areas who are excluded therefrom such transportation, feed, shelter, and other accommodations as may be necessary" and "to take such other steps as he or the appropriate military commander may deem advisable to enforce compliance with the restrictions applicable to each military area * * *"

57,200.3. Exclusive jurisdiction.—Exclusive jurisdiction may be acquired by the United States either by purchase of land with the consent of the Legislature of the State wherein the land comprising a military reservation lies, under the provisions of article 1, section 8, clause 17, of the Federal Constitution, or by direct cession by the State of such jurisdiction to the United States. Prior to February 1, 1940, it was legally presumed that the United States had accepted jurisdiction where offered. However, in either case, the express acceptance of jurisdiction by the United States is presently required by Federal law. Where the United States acquires exclusive jurisdiction, complete sovereignty is vested in the Federal Government and control by the State is terminated. In such cases there continues in effect, until abrogated, those rules, existing at the time the State surrenders jurisdiction, which govern the rights of the occupants of the territory transferred. Statutes enacted after the surrender of jurisdiction, however, are not a part of the body of laws in the ceded area. The criminal laws of the United States are in effect in areas where the United States has exclusive jurisdiction. Where there is no Federal criminal law applicable to a particular matter, the present laws of the State, applicable and in force on February 1, 1940, are

effective and a violation thereof will be deemed a violation of a like Federal offense and subject to a like punishment.

* * *

57,200.6. Service of process.—The reservation of the right to serve process is not considered by the courts a limitation on exclusive jurisdiction. However, on military reservations under the exclusive jurisdiction of the United States, reasonable regulations may be made by the commanding officer on the subject of service of process so that access to the property will not endanger either the process servers or the plant itself.

57,200.7. Jurisdictional status of Ordnance establishments.—The Office of the Chief of Engineers reports that the Federal Government has attained exclusive jurisdiction in certain establishments over which the Chief of Ordnance has retained responsibility in plant protection matters. The following list will be amended from time to time as jurisdiction is obtained at additional plants. Inquiry as to the present jurisdictional status of establishments not listed hereafter may be addressed to Safety and Security Branch, Washington Liaison Office, Attention of Legal Unit, Office of the Chief of Ordnance, Washington, D. C.

* * *

Louisiana Ordnance Plant 10-10-42

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57,201. Rules and regulations for military reservations.—Rules and regulations, promulgated by commanding officers for the safety and security of military reservations under their charge and the protection of the public interests therein, do not have the force and effect of a law, the violation of which would constitute a criminal offense. There is no present general statutory authority permitting the commanding officer of a

military reservation to prescribe rules, enforceable with criminal penalties, applicable to persons not subject to military law. If the rules and regulations so promulgated by the commanding officer are, however, substantially similar to either an existing penal law of the State in which the military reservation is located, violators thereof may be subject to criminal penalties in either the State or Federal courts, as the case may be. The commanding officer of a military reservation may always eject from the reservation violators of regulations promulgated by him, and can order such violators not to reenter the reservation. Re-entry thereafter would be punishable under the Federal Criminal Code.

57,201.1. Disciplinary enforcement of regulations at military reservations over which the United States has exclusive jurisdiction.—The commanding officer is responsible for the maintenance of law and order at military reservations under the exclusive jurisdiction of the United States. The contractor-operator is primarily responsible for the safety and security of the plant located on such military reservation, but is under no legal obligation to exercise police powers beyond the duties of any private citizen. The commanding officer may eject from the military reservation violators of regulations promulgated by him, and order such violators not to reenter the reservation. If an offense (which is prescribed by a Federal Criminal Statute) is committed on a military reservation, the commanding officer may cause the offender to be arrested and turned over, as soon as possible, to the United States marshal. Similarly, where an offense is committed on a military reservation, under the exclusive jurisdiction of the United States, which is made penal by the laws of the State in which the military reservation is located, in effect prior to February 1, 1940, and still in effect, the commanding officer may cause the violator to be arrested and turned over to the United States marshal as soon as possible.

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